State of Minnesota \ LEGISLATIVE COMMISSION ON PENSIONS AND RETIREMENT

S.F. 2749 (Tomassoni)

H.F. 3118 (Metsa)

Executive Summary of Commission Staff Materials

Affected Pension Plan(s):	MnSCU-IRAP, TRA
Relevant Provisions of Law:	Uncoded special law provision
General Nature of Proposal:	Permit an IRAP member to transfer coverage from IRAP to TRA; Provides comparable treatment for similarly situated individuals
Date of Summary:	March 20, 2014

Specific Proposed Changes

- Due to claimed MnSCU failure to offer Peter Del Caro a TRA election in 1994, he will now be permitted to transfer past and prospective coverage to TRA, with his IRAP account assets being used to cover part of full actuarial value of the past service. Any portion of the full actuarial value not covered by the IRAP account value would be paid by MnSCU. (Sec. 1)
- Provides comparable treatment to any other individuals who should have been offered a TRA election in 1994, but due to MnSCU error were not. (Sec. 2)

Policy Issues Raised by the Proposed Legislation

1. Alternate resolution: MnSCU could compensate Mr. Del Caro without need for legislation, or the matter could be handled in the courts.
2. Question of MnSCU harm, if any, and the person's personal responsibility to be aware of the 1994 election period.
3. Whether there is sufficient documentation on which to base determination of harm.
4. Cost to MnSCU and MnSCU's position on the bill.
5. Inconsistency of proposed treatment in this bill (MnSCU pays portion of full actuarial value) compared to treatment permitted under a similar 2006 case (MnSCU paid none of the full actuarial value).
6. Expansion to all individuals still employed at MnSCU who were improperly not offered a TRA election of coverage in 1994 could considerably increase MnSCU cost burden.
7. The provisions of Section 2 are inconsistent with usual Commission process of individual review of each case.
8. Possible windfalls related to Section 2. Some individuals would not have selected TRA if they had been offered an election in 1994, but may be very interested now because of the value of their IRAP account compared to the value of a TRA pension.

Potential Amendments

S2749-1A provides the same treatment as was given to the affected individual under the 2006 bill; the eligible person is responsible for paying full actuarial value of past service with no assistance from MnSCU.

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State of Minnesota \ LEGISLATIVE COMMISSION ON PENSIONS AND RETIREMENT

TO: Members of the Legislative Commission on Pensions and Retirement

FROM: Ed Burek, Deputy Director EB

RE: S.F. 2749 (Tomassoni); H.F. 3118 (Metsa): MnSCU-IRAP/TRA; Authorizing MnSCU Employee to Elect TRA Coverage and Transfer Past Service from IRAP to TRA; Offering Comparable Treatment to Similarly Situated Individuals

DATE: March 20, 2014

Summary of S.F. 2749 (Tomassoni); H.F. 3118 (Metsa)

S.F. 2749 (Tomassoni); H.F. 3118 (Metsa) provides treatment to Peter Del Caro comparable to what would have occurred if, in late 1994 or early 1995, he had elected Teachers Retirement Association (TRA) coverage rather than continue with Individual Retirement Account Plan (IRAP) coverage under a coverage election procedure permitted under 1994 law which Mr. Del Caro claims he was denied due to failure by the Minnesota State Colleges and Universities System (MnSCU) to identify him as eligible and offer him that election. Under the current bill, if Mr. Del Caro elects TRA coverage, after some minor adjustment for differences between TRA and IRAP contribution rates, the portion of Mr. Del Caro's IRAP account due to contributions made after December 31, 1994, shall transfer to TRA, and MnSCU will pay, either through direct payment or appropriation reallocation, the remainder of the full actuarial value.

The bill also requires MnSCU to identify all other individuals still employed by MnSCU who were also improperly denied participation in the 1994 elections, and these individuals are to be offered the same treatment as Mr. Del Caro.

The bill does not apply to an individual in similar circumstance already addressed by the Commission and Legislature under a 2006 special law.

Background Information on Relevant Topics

The following attachment provides background information on topics relevant to the proposed legislation:

- **Attachment A**: Background information on the MnSCU-IRAP Plan and the Supplemental Retirement Plan; prior requests to change coverage election.

Public Pension Problem of Peter Del Caro

In 1993, Peter Del Caro began employment with what is now the Mesabi Range Community and Technical College. Mr. Del Caro claims that when he began employment Mesabi Range was a community college, transforming to a community and technical college following a merger with a nearby technical college some time in 1996 or later. As of January 1, 1994, Mr. Del Caro was an instructor classified as "unlimited part-time" and for that employment was covered by the Higher Education Individual Retirement Account Plan (IRAP). During 1994, the Legislature enacted legislation merging Minnesota technical colleges into MnSCU, and as part of that broad action the legislation included provisions addressing pension coverage for technical college faculty and administrators, and also their community college counterparts. The choices were between defined contribution plan and defined benefit plan coverage. For the community college new hires, the specific plan choices were IRAP, which is a defined contribution plan, or TRA, which is a defined benefit plan. Since new employees were being given a range of retirement options, it seemed reasonable that existing community college faculty and administrators should be given a similar option to revise retirement coverage. That authority for existing employees was provided by Laws 1994, Chapter 508, Article 1, Section 10, which was coded in Minnesota Statutes 1994. That section, which would have applied to Mr. Del Caro, stated that individuals who were covered by IRAP as of July 1, 1994, and who were first employed after June 30, 1989, could elect to remain with IRAP or elect prospective TRA coverage. If TRA was elected, that coverage was to commence on the date the election was made. The individual's assets already invested in IRAP were to remain in IRAP and were not to be transferred to TRA. The election was irrevocable.

This 1994 law provided a brief window for Mr. Del Caro and others to elect defined benefit plan coverage. The provision was repealed in 1995. While it applied, the 1994 law had a requirement that transfer elections must occur "within 90 days from the dated on the executive director or plan administrator provides notification of the election." Commission staff's understanding is that these elections occurred in late 1994 or early 1995.

Mr. Del Caro claims that:

(1) he was never informed about the 1994 election opportunity to choose TRA coverage;
(2) MnSCU or its agents, as the IRAP plan administrator, had a responsibility to provide notice of that election opportunity but failed to provide that notice;
(3) he would have elected TRA coverage rather than continuing IRAP coverage if he had been given the opportunity; and
(4) he has been harmed by having IRAP rather than TRA coverage.

The Commission heard a similar bill in 2006 on behalf of Shelly Siegel, a North Hennepin Community College Director of Student Support Services. In supporting material provided with that 2006 bill, it was apparent that the IRAP administrator used certified mail to contact eligible individuals. Ms. Siegel contended that she never received any notification and was not aware of this election option until many years later. Ms. Siegel's contention that she was not notified was supported by a letter dated April 2, 2003, to Ms. Siegel from the plan administrator which states that in 1994 Ms. Siegel should have received a form to elect TRA or to remain in IRAP. That letter continued, "It was not made clear until last Spring that you had not been given the election to make this decision. Both the Campus and Wells Fargo checked your files and found that there was no election, indicating to us that you were not given the election."

Presumably, the IRAP administrator referred to in Ms. Siegel's case is the same IRAP administrator applicable for purposes of the bill currently before the Commission; which suggests that Mr. Del Caro should have received a certified mailing regarding the coverage election, and that the past or current plan administer should have documentation either that an election was offered to Mr. Del Caro, or that the plan administrator failed to provide that election.

Discussion and Analysis

The bill presumes that MnSCU failed to provide Mr. Del Caro with TRA-election forms, in 1994, which would have allowed him to transfer coverage to TRA. This created harm, and under the drafting MnSCU is required to remedy that harm. Mr. Del Caro would transfer prospective retirement coverage from IRAP to TRA, and past coverage to TRA beginning on January 1, 1995, the approximate date that the election of TRA coverage would have occurred if the individual had made a coverage election under a provision of 1994 law (Laws 1994, Chapter 508, Article 1, Section 10, which was coded as Minnesota Statutes 1994, Section 354B.02, Subdivision 5). If the eligible individual elects to transfer coverage, the value of the individual's IRAP account minus the expected current value of the account on December 31, 1994, transfers to TRA. If, for any portion of the post-January 1, 1995 period, the employee contribution to TRA was higher than the employee contribution to IRAP, the employee contribution rate difference plus 8.5 percent annual compound interest must be paid by the eligible individual to TRA. MnSCU shall pay to TRA the remainder of the full actuarial value of the service credit purchase, or have that amount deducted from state aid and transmitted to TRA.

The bill also requires MnSCU to identify all individuals similar to Mr. Del Caro, all individuals still employed in MnSCU who were improperly denied an election in 1994 by a failure on MnSCU's part, to offer them that election. These individuals are to be offered the same treatment as Mr. Del Caro.

For Mr. Del Caro, the treatment provided by the bill is an effort to approximate the treatment that would have been provided under the 1994 law, assuming that Mr. Del Caro had transferred prospective coverage from IRAP to TRA under that provision. The draft assumes the election occurred on January 1, 1995. The 1994 provision did not transfer the individual's IRAP account to TRA. That amount was to be retained in IRAP on behalf of the member. Thus, if Mr. Del Caro had made an election at the beginning of 1995, his IRAP account, funded by the employee and employer contributions to that account from his first employment date in 1993 to the start of 1995, plus investment earnings on that account, would remain in an IRAP account for him. At the current time, the value of that account would be equal to the value of the account on January 1, 1995, compounded by investment earnings since that date. We can call this the compounded 1995 value. The actual current value of the IRAP account presumably exceeds the 1995 compounded value, because considerable employee and employer contributions have been made to the account since the start of 1995, and those contributions presumably earned investment returns. LCPR14-036 transfers the actual current value of the IRAP account minus the compounded 1995 value. The amount to be transferred represents the post-January 1995 employee and employer contributions plus investment earnings on those amounts. The compounded 1995 value remains in Mr. Del Caro's IRAP account. If the employee contribution rate to TRA exceeded the employee contribution rate to IRAP for any portion of the post January 1, 1995 period, Mr. Del Caro must pay that amount to TRA with 8.5% interest. This 8.5% interest or investment return rate is the annual long-run investment return assumed in all actuarial reports for TRA and the other large Minnesota public pension plans.

The proposed legislation raises a number of pension and related public policy issues for consideration and possible discussion by the Commission, as follows:

1. Alternative Resolutions. The issue is whether this matter warrants Commission and legislative time for consideration, given other matters before the Legislature and the existence of alternative methods of resolving this matter. This issue can be resolved by enacting a special law, but it could also be resolved by an arrangement between Mr. Del Caro and MnSCU without legislative involvement. If the issue has merit, MnSCU could compensate Mr. Del Caro for the estimated difference between the value of his retirement benefit (or benefits) under continued MnSCU coverage compared to the estimated lifetime value assuming he had elected TRA coverage back in late 1994 or early 1995. Another alternative is court action.

2. Questions of Harm and Personal Responsibility. In considering this bill, the Commission is being asked to weigh whether there was harm done by MnSCU and the extent to which the individual holds some responsibility for creating the current situation. The bill's drafting implicitly assumes harm has occurred, that MnSCU caused that harm, and that MnSCU should be required to make the individual whole. If, instead, the Commission concludes that MnSCU did not cause harm, or that remedial action by MnSCU is not justified, then the Commission may choose to take no action on this bill or to take action on the bill only after adding an amendment which places the full cost on the individual rather than in part upon MnSCU. Even if the Commission concludes that MnSCU's action, or lack thereof back in 1994, has lead to reduced pension value for Mr. Del Caro, the Commission may wish to consider whether Mr. Del Caro has some responsibility in this matter. The Commission may wish to ask the parties if there is documentation, as there was in Ms. Siegel's case, that the plan administrator failed in its obligation to offer the coverage election to the individual. If the documentation clearly indicates that an election was offered to Mr. Del Caro, then the treatment requested in this bill lacks merit. However, even if the conclusion is that no election form was sent to him, the issue of individual responsibility remains. Even if he was not individually notified in 1994, if he had been paying attention to retirement issues at that time he would have contacted plan administrators and requested the election forms. In 1994, retirement coverage options for new and existing faculty and administrators suddenly become available. That would have been a topic of considerable interest, at least among faculty members who at that time and at that point in their careers where concerned about coverage. Presumably notice appeared in mailings or newsletters from MnSCU, from faculty unions, or from other parties that legislation had passed permitting existing MnSCU employees to elect TRA coverage. Mr. Del Caro is currently 56 or 57, and has now provided relatively long service to MnSCU. He is at an age and point in life where retirement is not that far off and is therefore quite concerned about the value of his pension. But a question for the Commission is whether back in 1994, when he was much younger and just starting his career at the college, and future career moves might be in the offing, whether he had the same strong desire to have defined benefit pension coverage.

3. Available Documentation. The issue is whether documentation is available supporting the treatment proposed by this bill. The files provided to Commission staff indicate a fair degree of tension between the parties but little mutual fact finding. Materials providing answers to key pieces of the puzzle are missing. It would helpful if documentation were submitted clearly establishing that Mr. Del Caro was, in fact, in IRAP on or before July 1, 1994. If not, the bill is misdrafted and arguments need to be re-characterized. Second, in the Commission's consideration of Ms. Siegel's situation in 2006, the Commission was presented with clear documentation that Ms. Siegel should have received a certified mailing offering her an election of plan coverage. The plan administrator acknowledged, in writing, that it failed in its responsibilities. The mailing was not made and the election was not offered. In the current situation, either the documentation is not there or there is disagreement about its meaning.

4. Position of MnSCU. The issue is MnSCU's position on this matter. If MnSCU did in fact cause harm and is willing to remedy that harm, that would considerably shorten and simplify the Commission's review of this bill. If issues of fact remain in dispute, the Commission may not be able to come to a resolution.

5. Cost of the Special Legislation. The issue is the cost imposed by the bill, which would need to be accurately estimated for a legislative review. The value today of Mr. Del Caro's IRAP account minus the portion attributable to pre-1995 contributions would need to be made, and the full actuarial value of the liabilities to be imposed on TRA must be computed in order to determine what amounts MnSCU would need to pay to help cover any portion of the full actuarial value not covered by the asset transfers coming from the employee.

6. Past Commission Actions. This issue is the degree to which the Commission wishes to be guided by actions of past Commissions when dealing with similar coverage change requests. Past similar bills have been few, and these are discussed in the last page or two of the attached background document. The Commission may wish to be aware that in the similar case involving Ms. Siegel in 2006, the

Commission and Legislature chose to pass language which placed the full cost on the plan member, rather than the treatment proposed in the current bill which attempts to hold the member harmless while placing any cost of the TRA coverage, in excess of the individual's IRAP account value, on MnSCU. The treatment requested under the current bill for Mr. Del Caro is different from and more generous than the treatment permitted to Ms. Siegel under the 2006 law. If the current bill were to pass in its current form, it is possible that the Commission and Legislature may be asked to reconsider Ms. Siegel's case. If the current bill passes with Section 2, every individual in this class will have been treated more generously than Ms. Siegel. The Commission may wish to consider removing Section 2 by verbal amendment if the Commission concludes that it would be better to consider these situations on a case-by-case basis, as they are brought to the Commission's attention, so each could be examined on its merit.

7. Cost Implications of the General Provision. Section 2 expands the bill to include all similarly situated individuals other than Ms. Siegel's 2006 case. Policy issues mentioned above are generally applicable, plus a few additional ones. MnSCU's cost would be higher, possibly much higher if it is determined that there are many similar cases.

8. Windfall Problem. The issue is windfalls at MnSCU's expense. The Commission may wish to consider that the Commission knows nothing about the individual circumstances of those covered by Section 2. Some of these cases might have considerable merit while others might lack merit. From a fairness standpoint, what matters is the choice that an individual would have made in 1994 if offered an election, and not what he or she prefers now. There may be individuals in the group covered under Section 2 who, although they were not offered an election in 1994, were at that time indifferent between IRAP and a defined benefit plan, or who strongly preferred IRAP. Back in 1994 they may have assumed they would soon be moving to other employment, and the portability of IRAP therefore appealed to them. However, as circumstances evolved over time, they remained in MnSCU employment, and looking back now they wish they had TRA coverage. For these individuals, the treatment provided by Section 2 does not represent a step toward justice and fairness, but a windfall at MnSCU's expense. If the Commission seeks to avoid windfalls at MnSCU's expense, the Commission may wish to remove Section 2 from the bill by verbal amendment.

9. Further Pension Plan Coverage Issue. The issue is that TRA coverage is the plan that may be elected under Section 2, but it is possible that, depending on the location and a person's particular employer, a first class city teacher plan might by the more typical coverage alternative. Back in 1994 there were three first class city teacher plans, and the 1994 pension plan coverage election law was written to permit coverage by TRA or an applicable first class city teacher plan, whatever plan would have been the reasonable alternative defined benefit plan given the location of the person's employing unit. But since 1994 the Minneapolis Teachers Retirement Fund Association (MTRFA) has consolidated into TRA, the Duluth Teachers Retirement Fund Association (DTRFA) may be consolidated into TRA under a bill being considered during the current legislative session, and consolidation of the St. Paul Teachers Retirement Fund Association (SPTRFA) into TRA is being studied. Given that few individuals are likely to be identified under Section 2 and the current circumstances, using TRA as the defined benefit plan alternative in Section 2 may be reasonable.

Potential Amendment for Commission Consideration

S2749-1A provides Mr. Del Caro and all other similarly situated individuals with treatment comparable to that provided to Ms. Siegel in 2006. Under the amendment, Mr. Del Caro and similarly situated individuals are authorized to transfer prospective coverage to TRA and past coverage back to January 1, 1995, with the individual paying the full actuarial value of the pension plan coverage change. If the Commission wishes to consider this amendment, the Commission may wish to seek verification that the authority will be used by the person on whose behalf this bill was drafted. If not, then the Commission may to consider whether it is worthwhile to further consider the bill.

Whether or not the written amendment is used, the Commission may wish to consider deleting Section 2 by oral amendment if the Commission concludes each case should be brought before future Commissions individually so each can be reviewed for merit.

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June 19, 2012

Peter Del Caro
909 Carter Circle
Eveleth, MN 55734

Dear Mr. Del Caro:

Deb Buria-Falkowski of the Mesabi Range Human Resources office recently forwarded to me correspondence in which you request that your retirement plan participation be moved from IRAP to TRA retroactively to your date of retirement plan eligibility in January, 1994. In your correspondence, you include documents as verification that you were not offered an opportunity to elect TRA when you became eligible for retirement program participation in January, 1994. In fact, at the time of your initial eligibility for the retirement plan, you were not statutorily eligible to elect TRA as your primary retirement plan. Minnesota Statutes § 354A.02. Thus, the college correctly notified you regarding your enrollment status.

In 1994, legislation was enacted that provided a 90 day "special election" period for those who had not previously been offered the opportunity to elect TRA. The language in Minnesota Statutes § 354B.02, Subd. 5 (1994) provided for a prospective irrevocable election for those individuals who were in IRAP as of July 1, 1994 and who were first employed by a college after June 30, 1989. Section 354B.02 was adopted on April 25, 1994, effective July 1, 1994, and was repealed by the Legislature in 1995. Laws of Minnesota 1995, ch. 141, Art. 3, § 31. Although the pertinent records for that election were held by the former community college system rather than Minnesota State Colleges and Universities, it is my understanding that notices were provided to all eligible employees regarding that election, and that its availability was widely documented. In any event, the opportunity to elect such a transfer expired nearly 18 years ago and there is no statutory provision for a new or retroactive election. We are thus unable to accommodate your request for a retroactive election to your eligibility date in 1994.

pertinent Rec. since, but evidence of documentation - advertising mail?

I want that Doc.

Sincerely,

Gary Janikowski
System Director, Personnel

cc: Deb Falkowski
Sara Ford, MSCF
Kerry Duncan, MSCF

16 July 2012

909 Carter Circle
Eveleth, MN 55734

MNSCU
Gary Janikowski, System Director
Wells Fargo Place
30 7th ST. E., Suite 350
St. Paul. MN 55101-7804

Dear Mr. Janikowski:

I have received your correspondence dated 19 June 2012 wherein you deny my request for TRA. Interestingly, you rely on my personnel file that contains records that I was never provided an option for electing TRA at my initial hire in 1994. Actually, my initial hire was September 1993, and later in 1994 I was hired as unlimited, part-time, and subsequently followed by an unlimited, full-time appointment in 1995. You categorically deny that at any of these dates I was eligible for TRA per Minnesota Statutes Section 354A.02. My personnel file contains the records proving that I was, indeed, never given an opportunity to enroll in TRA. I did receive a copy of that system letter (Office of the Chancellor) explaining that I was entitled to exclusively IRAP—it was mailed to my home address listed with the college, and interestingly enough documented in my personnel file under your safekeeping. **Point: records exist that I was never given opportunity to enroll in TRA.**

Subsequently you state that in 1994 legislation was enacted that provided a 90 day "special election" period for those who had not previously been offered the opportunity to elect TRA. By your own admission, I am one of those individuals the new legislation would cover. But instead of having any record(s) that I or Mesabi Range received such notification, you state since there are no records it appears that I had received notice. **Something so serious that the legislature enacted a law to correct the injustice,** and there is a record of that law that you cite, **but obviously not serious enough for MNSCU to document or record the matter that the employee actually received notice** of the 90 day special election period. **Point: no records exist that I was ever granted an opportunity to enroll in TRA via the new legislation in 1994—not in my personnel file, not at my institution where I work, and not at the system level. It was never mailed to my address on record as my IRAP enrollment had been, and there is no copy in my personnel file to confirm that mailing as had been done with my IRAP enrollment.**

Common sense and best practices strongly suggests that something as important as partaking in an IRAP Plan be signed, dated, and filed for preservation and that exists. TRA eligibility via a statutory right would also compel the exact same procedural safeguards and that simply did not occur and does not exist.

I am inquisitive and wondering just how many similarly situated employees were hired in 1994 and subsequently defaulted to IRAP because they never received any notice of the 90 day special election period for TRA? **I am also wondering about whether the System knew of problems similar to the ones I am encountering, specifically lack of notice and records?** A recent MNSCU Board of Trustees Joint Finance and Facilities and Human Resources Committee Meeting Minutes reveal that, indeed, there have been quite similar problems concerning system pension plans: **"Trustee Sundin said that in her experience, communication of options to employees has been the most troublesome. Ms. Olson agreed that often the problems are at the enrollment level and in record keeping."** Mr. Janikowski, you were sitting at that meeting with Vice Chancellor King and Gail Olson of the Office of General Counsel discussing system pension plans on 15 May, received my correspondence stating that I never received notice and no records exist showing I was ever granted an election for TRA in June, and ignored why that May meeting was called for in the first place—"....it was prompted by best practices and the fiduciary duty for the management of system pension plans and not due to any controversy or statutory requirement." Best practices like record keeping of all employee pension elections—not just some records some of the time. It is one thing not to recall what you had for breakfast yesterday; it is quite another matter to forget that the problems I identified in my correspondence to you directly after you attended that meeting in May.

In your letter mailed to me dated 19 June 2012, you state, "Although the pertinent records for that election were held by the former community college system rather than Minnesota State Colleges and Universities, it is **my understanding** that notices were provided to all eligible employees regarding that election, and that its availability was widely documented." As a System Director of Retirement Programs who attended the Board of Trustees Meeting on 15 May 2012 mentioned above, Mr. Janikowski you were already aware of the problems I identified in my letter to you. Yet with that background of knowing there were problems with pension enrollments and record keeping—you stated it is "my understanding" notices were provided in light of the facts: [1] no notice was mailed to me, [2] there is no record of any such notice documented, [3] that I personally did not sign off on a TRA election, [4] there is no record of any TRA waiver or my signature to that supposed TRA election, [5] that my institution of employment has all my personnel records including my application for employment and letters of reference as well as my exclusive enrollment into IRAP but nothing showing I was granted an opportunity for TRA enrollment, [6] MNSCU has no such record because, "the former community college system rather than Minnesota State Colleges and Universities" kept the records. The fact is Mr. Janikowski, you point to the former system and state they are responsible for the records—yet they do not have those records. One cannot locate a document that simply does not exist. And, Mr. Janikowski, you fully knew when you responded to my request that the above noted problems existed and you still chose to deny my request in light of all the contrary evidence—documented evidence that factually shows I was never granted an opportunity to enroll in TRA via the mandate of the statutory language passed in 1994. Of what value are the records but to prove a point later in time? However, Mr. Janikowski you twist that logic around to suggest that the lack of records is proof something did occur. It appears that no matter what amount of factually evidence I produce, Mr. Janikowski, you have already concluded the matter in my denial. I am confident that as long as the process takes, more data and evidence will be brought to light on the issues that I have identified and already known to you.

I am only requesting what I am entitled to, what every other similarly situated faculty member received, the right to enroll in a defined benefit pension plan—TRA.

Therefore I formally request you, Mr. Janikowski, to bring my case to the DCR for review.

Most Sincerely,
Peter Del Caro

Cc: Sara Ford, MSCF
Kerry Duncan, MSCF

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October 24, 2012

Peter Del Caro
909 Carter Circle
Eveleth, MN 55734

Dear Mr. Del Caro:

This is in response to your letter of July 16, 2012. We have reviewed your correspondence alleging that you did not receive proper notice in 1994 of an option to move to TRA, as well as your request that you be allowed to present your concerns to the DCR advisory committee. First, the issue will not be brought to the DCR advisory committee for discussion. The committee functions in an advisory capacity on investment and general plan administration issues, and has no role in considering individual complaints. Second, your complaint about this comes nearly two decades after you allege you did not receive notice. Even if we were persuaded that you are correct in your assertions, the system does not have the legal authority to transfer your participation to TRA.

I am sorry that we are unable to accommodate your request.

Sincerely,

Gary Janikowski
System Director, Personnel

cc: Rick Nelson, MSCF
Heather Kidd

Memorandum

To: Kevin Lindstrom and Sara Ford

From: Jess Anna Glover

Date: September 30, 2013

Re: Del Caro grievance

The memo provides a legal assessment of the grievance MSCF has filed on behalf of Peter Del Caro for failure to provide notice to him of his rights to choose between TRA and IRAP when he became eligible for the choice in 1994. The case has problems on both the merits and the procedural arbitrability that would likely prevent the local and Mr. Del Caro from securing the remedy he is seeking. Based on the analysis below, I would advise the local not to proceed any further with the grievance.

To prevail on the grievance, MSCF would carry the burden of proving at least the following: that either the 1994 statutory change placed an obligation on MnSCU directly to provide notice of the election to MSCF faculty or that the Master Agreement or MOU in place in 1994 placed that obligation on MnSCU, that MnSCU failed to provide notice, that MSCF was timely in filing its grievance, that there is a contractual provision to grieve, and the remedy is something that an arbitrator can award. Based on my research and analysis, we would not be able to carry that burden at arbitration.

Procedural Arbitrability

The procedural defects of the grievance will likely prevent the local from having the merits of the case heard and the requested remedy being granted. It is my understanding that Mr. Del Caro is certain that he did not receive notice about the option to elect TRA back in 1994. He is also certain that once he did know about the option he sought assistance from MSCF and the grievance was timely filed pursuant to the Master Agreement. If this case were to go to an arbitrator there is a significant likelihood that s/he would find that the grievance untimely and refuse to rule on the merits because it is unlikely that no notice was given to Mr. Del Caro in a mailing or newsletter from some source during the relevant time period in 1994 from which he could have taken action.

Merits Issues

There are significant weaknesses with the merits of the grievance. There is no contractual provision that we can find that directs MnSCU to provide the notice that we have asserted

they were obligated to provide. There is nothing in the current contract and nothing in the contract or any MOUs that Sara Ford reviewed at the time of the obligation in 1994. In fact, my research into the authority for the opportunity in 1994 specifically places that obligation on another party. It states, "Transfer elections under this section must be made within 90 days from the date on which the executive director or plan administrator provides notification of the election and must be elected on forms prescribed by the plan administrator or executive director." Laws 1994, Chapter 508, Article 1, Section 10 (modifying Minn. Stat. §354B.02, Subd. 5).

Without any authority, in the contract or in the statutory change at the time, we have no legal grounds to assert that MnSCU had a duty to provide notice, that they failed at that duty, and because of that failure, even given the significant delay in bringing this claim, MnSCU owes the extraordinary remedy of 1) forcing TRA to allow Mr. Del Caro into the system, 2) pay him a couple of hundred thousand dollars (estimated) to make his account whole.

Further, even if we could find authority, the remedy requested requires something beyond money from MnSCU, it requires authority for TRA to make the change. MnSCU does not give TRA the authority for such changes; the Minnesota Legislature does.

Even without the procedural obstacles, the merits of the case are weak and the remedy, through arbitration, appears to be beyond the authority of the arbitrator.

Roadmap to a Remedy – Legislative Action

In my research, I did find a legislative roadmap for Mr. Del Caro's case. Another MnSCU employee, Shelley Siegel, was similarly situated to Mr. Del Caro. Like Mr. Del Caro, several years had passed since the time period to make select the option to join TRA. Please see attached Executive Summary of Commission Report ("Siegel Report"). The Siegel Report provides the documentation that Ms. Siegel had from MnSCU, TRA, and most importantly from a legal perspective, Wells Fargo. Wells Fargo was MnSCU's plan administrator in 1994. Under the statutory authority, the plan administrator is the entity that would have had the obligation to provide notice to the employee. In Ms. Siegel's case, Wells Fargo acknowledged that duty, and that they failed to do it. Ms. Siegel was not an MSCF member, so we do not know if there was a grievance process with this matter, but the Report is very detailed in its analysis of the problem, background, question of harm, alternative resolutions, personal responsibility, and scope.

At the time of the Siegel Report, the legislature was considering two possible bills/remedies: 1) giving Ms. Siegel the election choice retroactively, with MnSCU having some responsibility for causing the harm and having to pay for part of the remedy; or 2) giving Ms. Siegel the election choice retroactively, with the individual having to pay for the entire remedy. The legislature did pass the second option in a 2006 omnibus bill which didn't cost MnSCU anything. That result is notable, but not determinative of the legal analysis of whether MnSCU had a duty under the CBA that MSCF would be able to grieve.

If Mr. Del Caro wants to pursue this matter further on an individual basis through a legislative fix, I recommend that he request his file from IRAP and Wells Fargo, to determine if documentation similar to that in the Siegel Report would support his position.

Memorandum

To: Kevin Lindstrom, President MSCF

From: Peter Del Caro

Date: 10/4/2013

Re: Grievance Process Termination

I am writing in response to the memorandum I received from Sara Ford authored by Jess Anna Glover and copied to you.

I am quite disappointed by the correspondence, but you should also be concerned as President of our Union, and I will tell you why.

The decision by Sara Ford to proceed no further on my case is disturbing in many ways. Taking the substance of the matter out of the analysis and viewing the matter procedurally reveals that if you accept Glover's opinion, then how do you account for the 18 months of work already put into my case? Since the inception of grievance we knew what we had to prove and hence started a data/evidence gathering to bolster my claim. We proceeded through the grievance process chronology fully realizing we would lose at the initial stage. We advanced procedurally knowing what MNSCU used for a defense and pursued the next phase of the process as anticipated. This is a pretty standard case where both sides know what they are up against. MNSCU has been through this process and MSCF has been through this process. Sara Ford is an experienced Field Representative and MNSCU has able-minded personnel to handle their end. No surprises. So why is my case terminated out of nowhere? I just received legislative support and my local representative, Jason Metsa, wanted to converse with Sara Ford and me for the purpose of drawing up a letter to support my position in the upcoming arbitration hearing. However, instead of receiving that assistance from Sara Ford I get a unexpected termination of my grievance with a "best of luck to you". Questions abound, namely did not Sara Ford consult with anyone concerning the merits of my case in the preceding 18 months? She stated to me and Kerry Duncan at our meeting over a year ago that my case had a better than 50-50 shot of winning. Sara Ford also intimated that she regularly meets with the team to discuss grievances. And, once you read through the Glover opinion memo, the "rationale" to terminate my case is based on nothing new—but oddly enough, the same exact information we started with 18 months ago. Logically I must ask, since the facts have not changed, why was my grievance worthy to start, continue for 18 months, continually collecting more data and support from legislators as requested of me by Sara Ford, suddenly become a grievance not worthy of arbitration? This certainly makes our current process subject to review—wasting all that time when perhaps we should have asked the Wizard of Glover the ultimate question sooner—like 18 months ago. But I am not of the opinion that the work Sara Ford has done up to this time was not fruitful.

For further analysis I add the language Sara Ford sent to me on 05/22/12, 11:33 AM, "Just a reminder, all of this of course contingent on the assumption that neither party will find evidence that they did give Peter the option and that he has since forgotten it or didn't recognize what it was at the time. If they come up with something Peter signed waiving any of his rights here, that will be the end

of the case. But otherwise, we march ahead as outlined above." **What happened to the march?** MNSCU does not have any documentation because they know it would end my grievance if they had it—my whole argument, I am not making it up. I can own up to a mistake—but let me make the mistake first.

However, if you do not accept the Glover assessment, then how you do account for the sudden termination of my grievance? **It clearly seems to me that however one attempts to support this decision to terminate, one will find the grand irony of having to admit incompetence.** Incompetence in the 18 months preceding the termination, incompetence in Sara Ford for agreeing with the Glover memo, or incompetence in the Glover opinion memo itself. This is why I stated earlier that you should be concerned as President of our Union. But I want to take this memo further and provide you with my insight behind the handling of my case as both a proud union member and an attorney.

The legal opinion authored by Jess Anna Glover states, "If this case were to go to an arbitrator there is significant likelihood that s/he would find that the grievance untimely (sic) and refuse to rule on the merits because it is unlikely that no notice was given to Mr. Del Caro in a mailing or newsletter from some source during the relevant time period in 1994 from which he could have taken action." Kevin, we knew that argument back in June 2012 when Gary Janikowski put it in writing, albeit more eloquently than Glover. Interestingly, Mr. Janikowski also reveals a problem for the MNSCU system in that they were not the record custodians at that time—Mesabi Range College was the keeper of records. This is not insignificant—but points to the long standing problem the system has with record keeping. Also, Mr. Janikowski states, '…it is my understanding that its availability was widely documented." He is addressing the idea that there is documentation that shows employees similarly situated to me were provided some sort of unofficial notice. **I have asked for that notice and so far MNSCU has NOT produced a single shred of evidence to support their claim that I received their notice but instead proffer only lip service as has Glover in her memo "…it is unlikely that no notice was given to Mr. Del Caro**…" From a legal perspective, MNSCU has a formal process for enrolling employees into retirement accounts. Formalized and documented because of the importance attached to retirement accounts. Subsequently stating in a so far not disclosed and informal location does not rise to the formal documented process used then and use now. The records at the college where I started have been maintained and they clearly show what no one wants to see—a clear record where I was enrolled into the IRAP and no (NONE) alternative selection was available. To the contrary, I was forced to "elect" the IRAP because the system language excluded me from TRA. We have that in my record and preserved for arbitration. Perhaps Ms. Glover should read it. The point is that 18 months later Glover states an opinion already stale and certainly worthy of pursuit—namely why can't the system proffer all this "widely documented" material that provided me, the Union, and the world notice? **Factually, I have produced the records that the system does have and in their chain of custody, namely those that conclusively prove that I was forced into the IRAP. It is well grounded in law that since these are business records—they automatically come into evidence.** Perhaps Ms. Glover should read up on the rules of evidence.

Glover further states that, "There is no contractual provision that we can find that directs MnSCU to provide the notice that we have asserted they were obligated to provide." Glover looked in the contract and all MOUs and determined that legally there is no duty on the part of the employer to provide notice to employees matters concerning retirement elections. Of course there is not any specific language in the contract as there is no express language in the contract about the day-to-day handling of human resource business. However, there is a segment of law called business law, perhaps the legal business environment that pretty much spells out the employer/employee relationship, and hence relies on the standard practices that the company or government routinely follows. That is, once the state set up a system whereby they meet with an employee, attain signatures, and further preserve the record for eternity—then that is the process/ law. The point is that Glover is looking in the wrong places, but if she actually looked in the correct places perhaps she

could find it. There is legal justification for holding MNSCU to follow employer/employee practice and provide me with personal notice of an important right that does contractually exist—my retirement. The practice established in the record—and provided record reveals that I was personally noticed of the forced IRAP election, it was signed by me, and also sufficiently important to be mailed to my residence at that time. However, the record shows no such documentation what so ever concerning the TRA waiver. Glover comes across as counsel for the other side, and poor counsel at that when she states, "Without any authority…MNSCU has no duty".

But Glover does more damage to the legal community and my case personally when she contends even if the authority were to be found, "MnSCU owes the extraordinary remedy of 1) forcing TRA to allow Mr. Del Caro into the system, 2) pay him a couple hundred thousand dollars (estimated) to make his account whole." This is simply poor legal analysis by legal counsel, Kevin. First off, it is not an extraordinary remedy. Legally it is called specific performance where I seek what I was entitled to in the beginning of my employment with the college/state. Transforming my claim from specific performance (standard request under this type of action) and making it an extraordinary remedy does me a great disservice and is not in par with contract remedies. Additionally Glover asserts paying me a couple hundred grand which reveals a lack of competence on Glover's part. The amount is based on my retirement age, projected out for another 10 years of service and at the height of my income producing years. Translate, my current IRAP would be sacrificed, transferred into the TRA fund, and I would have another decade to further fund that TRA account. This is not about concern for MNSCU's ability to fund my account, but the fact that I have been wronged. Nothing extraordinary about that, as counsel Glover should be advocating for my cause—not making me a parasite to the system she seems to protect. Remember, this is a legal opinion proffered by Glover and put in writing advising the termination of my grievance because MNSCU cannot afford to fund my portion of TRA that I was (am) entitled to in the first instance.

I find much fault in Glover's legal reasoning and I have great reservations about her competence in such matters and it gets worse. Glover presents a "Roadmap to Remedy" in her legal opinion. She states go after Wells Fargo, get them to admit it was their mistake, and fund my account personally. Wow, with advice like that why didn't MNSCU think of it? **The idea of blaming Wells Fargo is a ruse and ignores the elephant in the room, MNSCU. MNSCU has not denied they have an obligation to notice me—on the contrary they have stated on the record that I was informed via some yet-to be-produced evidence. Only Glover asserts MNSCU has no such duty—quite odd don't you think?** And if I instituted a personal suit against Wells Fargo, they would naturally bring in the state as a necessary defendant in the action. How would Wells Fargo know whether or not I selected IRAP over TRA—or vice versa? Wells Fargo would only know what the employer sent them. Legally this argument is fundamentally unsound. In law we suit everyone in the chain and especially the most culpable, but under the Glover opinion we narrow to a specific and collateral party, hence illogical.

I would like to make the following requests. Based on the illogical termination of my grievance by both Sara Ford and Glover, that an internal investigation be pursued as to why 18 months of work and building steam results in an about face, totally unforeseen termination. I would also like to see my grievance reinstated with another Field Representative as I am not impressed with Sara Ford's work ethic. I have the documentation that, unfortunately, reveals a pattern where I practically have to beg her to return my correspondence(s).

I have also attached other documentation, some in my record and some not yet in record that shows MNSCU has a problem with providing notice to employees—thereby establishing a causal link between the employer and employee—a duty on the part of the employer in this case to provide such notice to an employee. In the attached document I would like you to pay particular attention to paragraph 4 on page 2, " **The justification for the first two provisions appears to be harm done to the employee due to employer error…This involved a North Hennepin Community College**

employee who should have been given an opportunity to choose TRA coverage rather than continuing IRAP during elections authorized in 1994. The campus notified individuals of the election by certified mail, but a review of records at the college indicated that the college failed to include this eligible individual in the mailing. The 2006 language permitted the individual to elect prospective TRA coverage, with additional authority to use the IRAP account or any other sources permitted by law to purchase service credit in TRA at full actuarial value back to the date of the 1994-1995 election." (IRAP, MnSCU Supplemental Plan, Coverage Election Change, MN LCPR (rev. 10/2012). This is essentially my case and mirror image I might add. Why is my mirror image case not strong enough for arbitration in the legal opinion of Glover? Correct me if I am reading this important precedent wrong—but this is literally factually on point as well as producing a remedy I can live with!

I also have a suggestion for Jess Anna Glover, she should submit an application of employment and attach her legal opinion to MNSCU and work with them as their lackey-in-chief employment law coordinator. My grievance is about the fact that I was denied entrance to TRA, a pension plan. I was wronged and an injustice occurred. My grievance is about justice and making me whole again. I have asked for nothing that all similarly situated employees received when hired. The idea of funding my own retirement account is reprehensible. **Why does Glover presume notice was supplied by MNSCU, then deny MNSCU has a duty to provide notice, and pretty much suggest that I received notice?** In writing legal opinions one should be careful to remain true and what you state on page one should remain valid at the end of your opinion.

My grievance is basic in structure and flows logically. Upon hiring the employer produces forms including retirement forms. The employer controlled forms are signed by both the employee and an agent for the employer (usually H.R. personnel). After signatures, the forms are copied for each party. Subsequently the documents are recorded for prosperity. **According to Gary Janikowski, "In 1994, legislation was enacted that provided a 90 day 'special election' period for those who had not previously been offered the opportunity to elect TRA."** Minnesota law attempted to correct the problem—they identified the problem—**those who had not been previously offered the opportunity to elect TRA. That is my case as the paper trail reveals and MNSCU has admitted, "In fact, at the time of your initial eligibility for the retirement plan, you were not statutorily eligible to elect TRA as your primary retirement plan. Minnesota Statutes 354A02. Thus, the college correctly notified you regarding your enrollment status." Factually I am a member of that group the legislature intended to bring into TRA. Also note that Mr. Janikowski specifically states on the record that MNSCU has a duty to notice me.** I have never been offered the opportunity to elect TRA and to the contrary, I was denied entry to TRA and my records factually prove as much. MNSCU knew some employees were left out and the legislature recognized the problem and produced a window to correct the deficiencies. But instead of following the employer process described above and providing notice to the affected employees, gaining signatures and documenting the record—the employer assumed employees would know what to do even if they had no notice. Obviously the legislature thought it was a problem and I read the language as letting MNSCU (system) know that a problem exists and this is the measure to correct the problem. However, the opinion proffered by Glover places the burden of providing notice to affected employees on the employees—and in my instance I didn't even know I had a chance to elect TRA. You cannot pass up an opportunity if the opportunity does not exist.

I intuitively know I have a good faith argument when the opposing side has to dance around a simple proposition—show the evidence that I was noticed, where I signed away my right to elect TRA. It is that simple. Be it far better to engage in rhetoric and illogic than to admit a mistake has been made and man wronged.

I am going to forge ahead with my legislator support and find it ironic that while my legislators know I have been wronged and want to repair the damage, the people I thought would back me to the wall are not marching with me.

Something stinks in our house and it behooves us to clean it up. **Pass my commentary by some other legally trained individuals and see what you come up with.** I value your time and respect your position.

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Background Information on the MnSCU-IRAP Plan and the Supplemental Retirement Plan; Prior Requests to Change Coverage Election

The Minnesota State Colleges and Universities System (MnSCU) Individual Retirement Account Plan (IRAP) plan stems from the late 1980s, when state university and state college teachers and related employees sought coverage by a defined contribution plan rather than the Teachers Retirement Association (TRA). IRAP was established in 1988 (Laws 1988, Ch. 709, Art. 11) as a late addition to the conference committee report on the omnibus pension bill of that session. The IRAP plan, coded as Minnesota Statutes, Chapter 354B, was not implemented until mid-1989 due to problems in ensuring proper Social Security coverage. The plan was expanded to include technical college managerial employees in 1993 and technical college faculty in 1994. The Higher Education IRAP plan covers faculty members and upper level administrator personnel at MnSCU who wanted defined contribution rather than defined benefit plan coverage. The Higher Education IRAP plan does not cover faculty or administrators at the University of Minnesota.

Pension plans are classified either as defined benefit plans or defined contribution plans. Defined benefit plans establish a procedure or method (usually a formula) under which retirement annuities and benefits are calculated and are pre-determinable, leaving the pension plan contribution requirement a variable to be assessed periodically through the preparation of an actuarial valuation. Defined contribution plans establish a pension plan contribution requirement, leaving the calculation of an eventual retirement annuity or benefit to occur at the conclusion of the member's working career, based on the intangibles of investment income, age at retirement, and expected mortality.

The argument made by initial proponents of a defined contribution plan for higher education faculty and administrators is that higher education faculty, as a group, are highly job-mobile in a national market. If the individual changes employment to another college in another state, the individual retains the full value of the IRAP account, and that account continues to grow in value over time due to the continuing investment earnings on the account. A defined benefit plan, in contrast, favors individuals who provide long service for a single employer or at least within the same multi-employer retirement system. Under a defined benefit plan, an individual who leaves the plan after a few years may take a refund of the employee contribution plus interest at a rate specified in statute, but that does not include the employer contributions made on behalf of that employee, and the remainder of the investment growth on the account. A defined benefit plan, like TRA or one of the first class city teacher plans, may be a better choice for higher education faculty members who, through personal choice or lack of opportunity, are less mobile, particularly as these individuals become long-term employees. A defined benefit plan may also be best for higher education faculty members who have considerable prior TRA or first class city teacher plan covered service prior to hire or due to their past higher education service benefit plan coverage.

When the Higher Education IRAP plan was initially implemented, IRAP coverage was mandatory for new hires without prior covered service, while employees in eligible positions who had prior TRA service were given an option to elect IRAP rather than continuation of defined benefit coverage. Election rights and election procedures were frequently revised over the years. At the current time, all MnSCU employees have the coverage which they freely elected. Currently, new IRAP members are permitted to elect TRA coverage during the first year of employment. IRAP is the default coverage if TRA is not elected. Elections are irrevocable. (Also, in 2009 a provision was enacted permitting MnSCU faculty members with IRAP coverage to elect to transfer to TRA within one year after achieving tenure. If the newly tenured faculty member elects TRA, that person must also purchase past service credit in TRA at full actuarial value. The provision expires on June 30, 2014.)

The MnSCU higher education faculty is also covered by a plan called the Higher Education Supplemental Retirement Plan, which is also a defined contribution plan. Higher education faculty and administrators are covered by the Supplemental Retirement Plan whether the individual is a TRA member or an IRAP member. The Supplemental Retirement Plan was created in 1967. At that time, TRA provided the primary coverage for higher education faculty and the Supplemental Retirement Plan was created to address deficiency in the benefits provided by TRA. Those deficiencies in TRA benefits were addressed decades ago when TRA moved to using the high-five average salary to compute benefits, and benefits were further enhanced in more recent years. The problem that the Supplemental Retirement Plan was intended to address has been eliminated. Given that elimination, the purpose for continuing the Supplemental Retirement Plan currently is unclear.

Prior Requests to Change the Coverage Election

Over the years there have been various requests to allow at least some MnSCU members to reverse the irrevocable plan coverage elections. Some of these requests have been for single individuals, others for classes of individuals, such as a 2004 bill, H.F. 286 (Huntley): IRAP/Teacher Plans: Technical College Benefit Coverage Re-Election and Combined Service Annuity Inclusion. In 2002, bill drafts were made for a technical college teacher who contended that he should be permitted to reverse his election of IRAP rather than defined benefit plan coverage because he had received inadequate advice prior to making the election and the time permitted for making an election was too short. In 2004 this request was broadened under H.F. 286 (Huntley) to include all technical college teachers who elected IRAP under the elections that occurred when the technical colleges were merged into MnSCU in 1995. These 2004 or earlier bills were not heard. A hearing request for H.F. 286 in 2004 was withdrawn by the author.

The requested second chance election in the 2004 bill likely stemmed from arguments made a few years earlier by the technical college teacher who requested another election. The contention was that technical college teachers, following the merger of the technical colleges into the MnSCU system, were given too short a time period to make the retirement coverage elections, and that retirement coverage information provided to the technical college teachers was so considerable that it constituted an overload. The merger of technical college teachers into MnSCU and the requirement that technical college teachers elect between their prior retirement plan coverage and IRAP was provided for in 1994 (Laws 1994, Ch. 508, Art. 1, Sec. 11; Laws 1994, Ch. 532, Art. 5, Sec. 1, Subd. 2). The provisions were enacted on April 22, 1994, and May 2, 1994, respectively, and became effective 14 or 15 months later, on July 1, 1995. Thus, the process of formalizing the retirement coverage elections should have been no surprise for MnSCU, the four affected teacher retirement plans, the various teacher bargaining units, and technical college teachers.

In 1995 (Laws 1995, Ch. 141, Art. 4, Sec. 9), the actual retirement coverage election period was lengthened from 60 days to 90 days, in response to MnSCU and MnSCU employee bargaining representative requests. Thus, the chronology of the applicable legislation suggests that the technical college teacher transfer to MnSCU and their election of benefit coverage had a very long lead time during which the affected individuals could prepare for this retirement coverage election, and the Legislature specifically addressed the request for additional time to make the election. With more than a year of advance notice and with the choice being a simple one of the selection of defined benefit plan coverage or of defined contribution plan coverage, technical college faculty members should have been well positioned to comprehend the choice that they were requested to make in 1995.

Only three requests, all fairly recent, for special consideration involving IRAP/defined benefit teacher plan elections have been enacted. The justification for the first two provisions appears to be harm done to the employee due to employer error. The first occurred in 2006 (under Laws 2006, Ch. 271, Art. 14, Sec. 8. The source bill was S.F. 2248 (Skoglund); S.F. 2462 (Wagenius)). This involved a North Hennepin Community College employee who should have been given an opportunity to choose TRA coverage rather than continuing in IRAP during elections authorized in 1994. The campus notified individuals of the election by certified mail, but a review of records at the college indicated that the college failed to include this eligible individual in the mailing. The 2006 language permitted the individual to elect prospective TRA coverage, with additional authority to use the IRAP account or any other sources permitted by law to purchase service credit in TRA at full actuarial value back to the date of the 1994-1995 election. A second case occurred in 2008. (It passed as Laws 2008, Ch. 349, Art. 16, Sec. 4. The source bill was H.F. 2803 (Greiling); S.F. 3618 (Marty).) This involved an employee initially excluded from coverage because the initial employment was part-time. The person, first employed in excess of 25% time in 2005 and who became a full-time faculty member in 2007, was covered by IRAP because of a MnSCU failure to inform the individual of retirement coverage options. Under the legislation the individual was permitted to transfer coverage to TRA. To obtain past service credit in TRA, the person's IRAP account was transferred to TRA, and MnSCU was required to pay to TRA any difference between that amount and the full actuarial value of the service credit.

A third special law provision passed in 2010, but the policy justification for that provision is not clear. S.F. 2633 (Sparks); H.F. 2550 (Poppe) was heard by the Commission on February 16, 2010. The situation involved a MnSCU employee, not a faculty member, who had been covered by MSRS-General for many years. The person's MnSCU position was upgraded or reclassified, and due to that upgrade the person was no longer eligible to continue in MSRS-General coverage. Instead, the coverage available to the person was default coverage by IRAP or an election of TRA. Given the past coverage (over 20 years) by MSRS-General, and also some brief prior employment that had been covered by PERA-General, it was clearly in the best interest of the person to elect TRA coverage. This would have permitted the person to use the combined service annuity provision to create defined benefit plan coverage for a long career, and also to permit the person to repay refunds to PERA-General and to MSRS-General for brief periods of uncovered service. However, the person failed to elect TRA, and so the default IRAP coverage applied.

There was no indication of employer error or harm, and representatives from MnSCU, TRA, and an employee union argued against the bill. The Commission, acting as a subcommittee due to lack of a full quorum, took a vote on whether to recommend the bill for inclusion in the Commission's omnibus bill, and the bill failed. However, language similar to the original bill was added to the Commission's omnibus bill in House Government Operations, and was eventually enacted.

The reluctance of the Legislature to reopen IRAP/TRA coverage elections except under extraordinary circumstances reflects concerns about plan cost and other policy matters. Retirement coverage elections are major decisions which should be made by the individual after careful study of the implications. Once an election is made, it cannot be undone without imposing costs and/or shifting risks to other parties. For these reasons, the applicable coverage provisions in current law specify that these elections are irrevocable. Allowing individuals to shift to TRA or first class city teacher plans, in some cases many years after employment commenced, creates adverse selection. Adding very young employees to defined benefit plans is likely to lower plan normal cost. Adding older employees has the opposite effect. The typical new MnSCU employee is likely to be older than a typical K-12 teacher. Allowing MnSCU employees to shift to TRA or a first class city teacher plan after years or even decades of MnSCU service would raise the defined benefit pension plan's normal cost. Also, the individuals who would want to shift to these plans are a self-selected group. They will shift to these plans because they intend to remain in covered service and retire from the plan (an individual who intends to leave MnSCU employment and move to other college teaching employment in another state would presumably want to remain with IRAP coverage, because the full value of the IRAP account would remain with the individual). The turnover assumptions (probabilities of leaving covered employment at each age prior to retirement) used by the actuaries in determining defined benefit plan cost is violated, again serving to drive up the true cost of the plan.

The investment markets at a given point in time also create interest in switching to defined benefit coverage. In years when the markets are providing extraordinary returns there is little interest in shifting to defined benefit plans, because individuals are convinced they can do better investing their account than if they would if they had a defined benefit pension plan providing a benefit specified based upon age, high-five salary, and years of service. In bad investment times, individuals with defined contribution coverage are far more likely to seek a switch in coverage because the value of an individual's account will have minimal growth or may fall in value. Allowing a switch to a defined benefit plan moves all investment risk to the plan. However, individuals and retirement funds are investing in the same markets. When the markets provide individuals with weak positive or even negative returns, pension fund investment returns will also be weak, well below the 8.5% long-term return needed by the pension fund.

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Minnesota Session Laws 1994

CHAPTER 508-H.F.No. 2124

ARTICLE 1
TECHNICAL COLLEGE TEACHING PERSONNEL

Sec. 10. Minnesota Statutes 1992, section 354B.02, is amended by adding a subdivision to read:

Subd. 5. [OPTIONAL ELECTION PROVISIONS FOR STATE UNIVERSITY AND COMMUNITY COLLEGE PARTICIPANTS.]

(a) Notwithstanding any other provision of this chapter or chapter 354 to the contrary, state university and community college employees who have not previously exercised their option to elect to transfer to this plan or remain with the teachers retirement association are eligible to make that election. Participants in either the plan or association may transfer benefit coverage to the other. A transfer election is irrevocable during any period of covered employment under this section and is subject to the conditions of paragraphs (b), (c), and (d).

(b) Members of the teachers retirement association as of July 1, 1994, or employees newly hired after that date who have prior allowable service credit as a member in the teachers retirement association are eligible to transfer service credit prospectively only. Existing contributions and service credit must remain with the teachers retirement association and the person is eligible for an augmented deferred retirement annuity from the teachers retirement association under section 354.55, subdivision 11. A transfer election made under this subdivision is irrevocable.

(c) Members of the plan as of July 1, 1994, who were first employed after June 30, 1989, may transfer membership prospectively only to the teachers retirement association, effective on the date the transfer election is made. Funds previously invested under the plan with the financial institution selected by the member are not eligible to be transferred to the association. Withdrawal of funds from the plan by a member is subject to rules of the plan. An election to transfer membership to the teachers retirement association is irrevocable during any period of covered employment. The employer of a transferring member must make the additional employer contribution provided for in section 354.42, subdivision 5, for future service only.

(d) Transfer elections under this section must be made within 90 days from the date on which the executive director or plan administrator provides notification of the election and must be elected on forms prescribed by the plan administrator or executive director.

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..... moves to amend S.F. No. 2749; H.F. No. 3118, as follows:

Page 1, delete lines 24 to 25

Page 2, delete lines 1 to 36

Page 3, delete lines 1 to 15 and insert:

"(c) To be eligible for coverage by the Teachers Retirement Association, an eligible person must submit a written application to the executive director of the Teachers Retirement Association on a form provided by the Teachers Retirement Association. The application must include all documentation of the applicability of this section and any other relevant information that the executive director may require. Following receipt by the executive director of the written application specified in this paragraph and receipt of the payment specified in paragraph (e):

(i) Teachers Retirement Association plan membership begins as of the first day of the first month following receipt of the payment required under this section;

(ii) individual retirement account plan coverage terminates for the applicable eligible person; and

(iii) past salary and service credit is granted in the Teachers Retirement Association from January 1, 1995, as specified in this section.

(d) The authority granted by this section is voided if the applicable eligible person terminates from Minnesota State Colleges and Universities system employment before receipt by the executive director of the Teachers Retirement Association of the application specified in this paragraph and the amount specified in paragraph (e).

(e) To receive the treatment specified in this section, an eligible person shall make payment of the amount determined under Minnesota Statutes, section 356.551, to the executive director of the Teachers Retirement Association for the period from January 1, 1995. The eligible person is authorized to cover the payment using assets transferred from the eligible person's individual retirement account plan account, or from any other sources permitted by law. The total amount to be paid under this paragraph must be determined by the executive director of the Teachers Retirement Association. Written notification of the amount required under this paragraph must be transmitted to the eligible person.

(f) Authority to make the payment specified in this section expires on December 31, 2014."

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SENATE
STATE OF MINNESOTA
EIGHTY-EIGHTH SESSION

S.F. No. 2749

(SENATE AUTHORS: TOMASSONI and Bakk)

DATE	D-PG	OFFICIAL STATUS
03/17/2014	6286	Introduction and first reading Referred to State and Local Government

A bill for an act

relating to retirement; Teachers Retirement Association and the individual retirement account plan; correcting a plan election provision; authorizing eligible Minnesota State Colleges and Universities system employees to elect Teachers Retirement Association coverage and to receive retroactive coverage.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. **TEACHERS RETIREMENT ASSOCIATION; PROSPECTIVE TEACHERS RETIREMENT ASSOCIATION COVERAGE; PURCHASE OF PAST SERVICE CREDIT.**

(a) An eligible person described in paragraph (b) is authorized to become a coordinated member of the Teachers Retirement Association and to purchase service and salary credit in the Teachers Retirement Association coordinated plan retroactively from January 1, 1995, upon making an election under paragraph (c) and upon making all required payments under paragraphs (d) and (e).

(b) An eligible person is a person who:

(1) was born on October 29, 1957;

(2) has been employed at Mesabi Range Community and Technical College as an instructor since 1993;

(3) in 1994 was classified in the unlimited part-time category;

(4) became eligible for and was covered by the higher education individual retirement account plan in January 1994; and

(5) was not offered an election of Teachers Retirement Association coverage, as required under Laws 1994, chapter 508, article 1, section 10.

(c) To be eligible for coverage by the Teachers Retirement Association, an eligible person must submit a written application to the executive director of the Teachers

Retirement Association on a form provided by the Teachers Retirement Association. The application must include all documentation of the applicability of this section and any other relevant information that the executive director may require. Teachers Retirement Association plan membership commences as of September 1, 2014, for an applicable eligible person, and past salary and service credit is granted from January 1, 1995, as specified in this section, following receipt by the executive director of the written application specified in this paragraph and receipt of the payments specified in paragraphs (d) and (e). The authority granted by this section is voided if the applicable eligible individual terminates from Minnesota State Colleges and Universities system employment prior to receipt by the executive director of the Teachers Retirement Association of the application specified in this paragraph and amounts specified in paragraphs (d) and (e). Coverage by the Teachers Retirement Association is in lieu of coverage by the individual retirement account plan.

(d) If an eligible person makes an election under paragraph (c), the eligible person shall make, before September 1, 2014, a contribution equal to the excess, if any, of the employee contributions that the individual would have made if the Teachers Retirement Association had provided coverage from January 1, 1995, rather than the individual retirement account plan. These additional contribution amounts shall include 8.5 percent annual compound interest computed from the date the contribution would have been made if deducted from salary until paid. The total amount to be paid under this paragraph shall be determined by the executive director of the Teachers Retirement Association and written notification of the amount required under this paragraph should be transmitted to the eligible individual.

(e) If payment is made under paragraph (d), the value of the applicable eligible person's higher education individual retirement account plan account shall be determined as of September 1, 2014. The executive director of the Teachers Retirement Association shall also compute that account's compounded 1995 value. The compounded 1995 value is the value of the applicable account as of January 1, 1995, plus 8.5 percent annual compound interest on that amount computed from January 1, 1995, to September 1, 2014. Notwithstanding any law to the contrary, if payment is made under paragraph (d), the value of the applicable eligible person's individual retirement account plan account as of September 1, 2014, minus the compounded 1995 value, shall be transferred to the Teachers Retirement Association on or before September 15, 2014.

(f) The Teachers Retirement Association shall determine the full actuarial value imposed upon the Teachers Retirement Association under this section due to the salary and service credit purchase.

(g) From the total amount computed under paragraph (f), the executive director of the Teachers Retirement Association shall subtract the amounts received under paragraphs (d) and (e). The Minnesota State Colleges and Universities system is authorized to transmit the remaining amount, if any, to the executive director of the Teachers Retirement Association.

(h) Any payment amount specified from the Minnesota State Colleges and Universities system under paragraph (g) shall be transmitted to the Teachers Retirement Association within one month following receipt of amounts transmitted under paragraphs (d) and (e), and following notification from the executive director of the Teachers Retirement Association. If a payment from the Minnesota State Colleges and Universities system specified under paragraph (g) is not made, the executive director of the Teachers Retirement Association must notify the commissioner of Minnesota Management and Budget of this fact and that commissioner must order that amounts specified under paragraph (g) shall be deducted from appropriations or state aid to the Minnesota State Colleges and Universities system and be transmitted to the Teachers Retirement Association.

EFFECTIVE DATE. This section is effective the day following final enactment.

Sec. 2. **PROSPECTIVE TRA COVERAGE; SERVICE CREDIT PURCHASE; IDENTIFICATION OF ELIGIBLE PERSONS NOT OFFERED ELECTION.**

(a) An eligible person is a person who:

(1) was employed during all or part of the period from January 1, 1994, to December 31, 1995, by a Minnesota state college, state university, or community college under the authority of the Minnesota State Colleges and Universities system board or a predecessor organization;

(2) is currently employed in the Minnesota State Colleges and Universities system with coverage by the higher education individual retirement account plan;

(3) has not commenced receipt of any assets or benefits derived from the individual retirement account plan account, or commenced receipt of any benefits from the Teachers Retirement Association, or any first class city teachers retirement association plan; and

(4) should have been offered an election of plan coverage under Laws 1994, chapter 508, article 1, section 10, but was not offered that election due to a failure by the Minnesota State Colleges and Universities system board or its agents to identify all persons eligible for those elections.

(b) Notwithstanding any law to the contrary, a person specified in paragraph (a) is eligible for the treatment specified in section 1.

(c) The board of the Minnesota State Colleges and Universities system or its agent shall notify by certified mail all persons identified in paragraph (a) by July 15, 2014, of their eligibility under this section.

Before February 1, 2015, the board of the Minnesota State Colleges and Universities system shall report to the executive director of the Legislative Commission on Pensions and Retirement on the number of persons identified under this section, the number electing Teachers Retirement Association coverage, and the payment transmitted by the Minnesota State Colleges and Universities system to the Teachers Retirement Association in each case, either through direct payment or aid or appropriation reallocation.

(e) This section does not apply to an eligible person specified in section 1.

(f) This section does not apply to a person specified in Laws 2006, chapter 271, article 14, section 8.

(g) This section expires on July 1, 2015.

EFFECTIVE DATE. This section is effective the day following final enactment.