

CONCURRING OPINION BY ACOBA, J.

I agree with the majority's reasoning that the term "accrued benefits" in article XVI, section 2 of the Hawai'i Constitution includes health plans of State and County retirees. I concur in the result only as to the majority's application of Hawai'i Revised Statutes (HRS) § 87A-23(1) (Supp. 2006) (stating that "[t]he [health] plan . . . shall provide benefits that approximate those provided to a similarly situated beneficiary not eligible for medicare")<sup>1</sup> and HRS § 87A-23(3) (Supp. 2006) (stating that "[t]he [health] benefits available . . . shall approximate the benefits that would be provided to a similarly situated employee-beneficiary not eligible for medicare").<sup>2</sup>

I write separately in regard to the majority's position that it is unnecessary to discuss whether health benefits accrued

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<sup>1</sup> HRS § 87A-23(1) states as follows:

**Health benefits plan supplemental to medicare.** The board shall establish a health benefits plan, which takes into account benefits available to an employee-beneficiary and spouse under medicare, subject to the following conditions:

- (1) There shall be no duplication of benefits payable under medicare. The plan under this section, which shall be secondary to medicare, when combined with medicare and any other plan to which the health benefits plan is subordinate under the National Association of Insurance Commissioners' coordination of benefit rules, shall provide benefits that approximate those provided to a similarly situated beneficiary not eligible for medicare[.]

<sup>2</sup> Subsection (3) states as follows:

- (3) The benefits available under this plan, when combined with benefits available under medicare or any other coverage or plan to which this plan is subordinate under the National Association of Insurance Commissioners' coordination of benefit rules, shall approximate the benefits that would be provided to a similarly situated employee-beneficiary not eligible for medicare[.]

either upon the employee's membership in the Employee Retirement System (ERS) or at some point in time after the employee became a member of the ERS. Majority opinion at 36 n.14. The majority does not address this issue stating that it "declines to address any issues raised by [this] opinion because they have not been argued on appeal on this case." Id. at 37 n.15.

However, in their joint opening brief, Appellee-Appellant State of Hawai'i and Appellee-Cross-Appellant Board of Trustees of the Hawaii Employer-Union Health Benefits Trust Fund [collectively, "Appellants"] argued that "health benefits are not included among the 'accrued benefits' protected by Article XVI, Section 2." In response, Appellants-Appellees Marion Everson, James Dannenberg, Billy Southwood, Valerie Yamada Southwood, Duane Preble, and Sarah Preble [collectively, "Appellees"] argued that "public employees' health benefits accrue and fully vest at or before retirement; there is no waiting period." At oral argument, counsel for Appellees further stated their position:

[APPELLEES' COUNSEL] . . . I would ask you to look at the record, this is in volume 2, page 249. You'll find . . . a copy of the 1978 pamphlet, which this court considered in the first Chun case in 1980[, Chun v. Employees' Ret. Sys. of the State of Hawaii, 61 Haw. 596, 607 P.2d 415 (1980),] and the court at that time said that this pamphlet was entitled to great weight in understanding how . . . the pension law was to be applied, and in this pamphlet . . . one of the questions that is asked is, "Am I entitled to other benefits?" and this pamphlet put out by the employee's retirement system says, "Yes. In addition to cost of living benefits, you are entitled to medical care for you and your family, without cost."

[JUSTICE ACOBA]: . . . [Appellants] make[] the argument that there are those pamphlets out there but the law has changed since then. But the reason you rely on those pamphlets is to indicate that benefits have been, in the past, a . . . part of the membership . . . part of the retirement membership status.

[APPELLEES' COUNSEL]: Package, that's right. They were part of the package and they became vested, or in the terms of article XVI, section 2, they became accrued when the members served during the time that these benefits were

promised. And it is true that in 2001 they changed the law but under article XVI they had the ability to change the law in 2001 only prospectively; and to say that for people hired after 2001 the rules were going to change, and from time to time they have done that, tinkering with the benefits that new employees get. But they cannot, under the constitution, tinker with the benefits of membership for people who have worked and given their services based on that bargain that was struck.

MP3: Oral Argument, Hawai'i Supreme Court, at 00:27:54 (Nov. 19, 2009), available at

[http://www.courts.state.hi.us/courts/oral\\_arguments/archive/oasc29359.html](http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc29359.html) (emphases added). As Appellees' counsel maintained in oral argument, health benefits "accrued when the members served during the time that these benefits were promised." Id.

Inasmuch as we hold that health benefits for retired State and County employees are "accrued benefits" under article XVI, section 2 of the Hawai'i Constitution, such benefits would fall within the scope of such protection and cannot be abrogated by statute. Hence, the accrual of such benefits cannot be diminished or impaired by HRS § 87A-23(1) and (3). Because such benefits cannot be diminished, that array of health plan services most advantageous to the employee during his or her service must be deemed the "accrued benefits" under article XVI, section 2; otherwise "diminishment or impairment" of accrued benefits would result.

