

\*\*\* FOR PUBLICATION \*\*\*

DISSENTING OPINION BY LEVINSON, J.,  
IN WHICH MOON, C.J., JOINS

I dissent.

On July 7, 2005, the appellee-appellant Board of Trustees of the Employees' Retirement System (ERS) of the State of Hawai'i [hereinafter, "the ERS Board"] filed a motion for reconsideration of this court's June 17, 2005 published opinion in Honda v. Bd. of Trs. of the Employees' Ret. Sys., No. 23625, slip op. (Haw. June 17, 2005), which vacated the July 28, 2000 final judgment of the circuit court of the first circuit, the Honorable Allene R. Suemori presiding, and "remand[ed] to the [circuit] court with instructions to remand the case to the ERS [Board] for further proceedings to consider the matters enumerated [in the majority opinion] in the framework of the entire record and in view of the ERS's fiduciary duty to retirees." Id., slip op. at 24. In its memorandum in support of the motion, the ERS Board asserts, inter alia, as follows: (1) that this court "has decided non-justiciable questions" because (a) the "ERS does not have the jurisdiction to decide remedies under [Hawai'i Revised Statutes (HRS)] Chapters 661 or 662" and (b) this court "cannot waive the [ERS's] sovereign immunity"; (2) that "the legislature must decide [the] ERS's fiduciary duties to its members"; and (3) that "[n]o statute authorizes . . . [anyone] to change an ERS member's retirement option[,] such that, "[o]n remand, [the] ERS is . . . left in the position of either exceeding its statutory authority or violating this court's order."

\*\*\* FOR PUBLICATION \*\*\*

The ERS Board's motion for reconsideration exposes the veritable Pandora's Box that the majority opinion has opened in the present matter, including pressing jurisdictional issues -- i.e., justiciability pursuant to HRS Chapter 91 and the ERS's sovereign immunity -- and has also identified a fundamental point of law that the majority opinion has either overlooked or misapprehended, Hawai'i Rules of Appellate Procedure (HRAP) Rule 40(b) (2005), to wit, that HRS § 88-283(b) (1993) -- which is undisputedly the controlling statute as to the present matter -- provides that "[a]ny election of a mode of retirement shall be irrevocable." Thus, even if the ERS Board were to find on remand that, "in the framework of the entire record and in view of [its] fiduciary duty to retirees," Honda, No. 23625, slip op. at 24, it had provided insufficient information to the appellant-appellee Katsumi Honda [hereinafter, "Katsumi"], the ERS Board is nonetheless bound to apply HRS § 88-283(b), which mandates that Katsumi's election of the "normal" retirement option is irrevocable. The dissenting opinion noted that the foregoing statutory provision prescribes the appropriate disposition of the present matter. See Honda, No. 23625, slip dissenting opinion at 4 (stating "that the circuit court erred in ordering that [the appellant-appellee Helen S. Honda], a non-ERS member, could retroactively revise an irrevocable method of distribution").

That being the case, I would grant the ERS Board's motion for reconsideration and adopt the analysis and disposition set forth in the dissenting opinion. See id., slip dissenting opinion at 47.

