

**CITY OF PONTIAC, MICHIGAN  
GENERAL EMPLOYEES RETIREMENT SYSTEM  
BOARD OF TRUSTEES  
MAY 13, 2008  
SPECIAL MEETING**

A special meeting of the Board of Trustees was held on Tuesday, May 13, 2008 at the Shrine Room, Main Floor, City Hall, 47450 Woodward Avenue, Pontiac, Michigan 48342. The meeting was called to order at 10:07 a.m.

**GERS TRUSTEES PRESENT**

Koné Bowman  
Raymond Cochran  
Charlie Harrison, Chairman

Javier Saucedo, Vice Chair  
Devin Scott  
Debra Woods

**TRUSTEES ABSENT**

Shirley Barnett (*absent*)  
Kevin Williams (*excused*)  
Andrea Wright (*excused*)  
Clarence Phillips, Mayor

**OTHERS PRESENT**

Cynthia Billings, Sullivan, Ward, Asher & Patton, P.C.  
Ellen Zimmermann, Retirement Systems Administrator  
Jane Arndt, M-Administrative Assistant

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**RETIRE/REHIRE LEGAL OPINION**

Chairman Harrison said that the meeting was called regarding the legal opinion for the retire/rehire resolution that was put forward by the City Council. He said at the last meeting the issue of the Board's attorney providing a legal opinion for the retire/rehire motion for the City Council was discussed and not accepted. The Administration has requested that the Board vote for their attorney to provide the Retirement System with a legal opinion regarding this issue.

He said that there is also another matter for discussion. The City is looking into IRC Section 420 which would allow them the ability to fund the VEBA from the retirement fund. Ms. Billings said that she has prepared a legal opinion for review and discussion today on how this could impact the funding level of the pension system. Chairman Harrison asked that the agenda be amended to include this issue.

**RESOLUTION 08-032** By Cochran, Supported by Woods

Resolved, That the Board approve the addition of the Section 420 transfer legal opinion to the agenda for discussion.

Yeas: 6 – Nays: 0

Trustee Scott asked if it would be better to wait for the full Board. Ms. Billings said that it could be discussed again at the regular meeting and that the report was for informational purposes only.

**Re: Retire/Rehire Legal Opinion**

Trustee Cochran said that it came to the Administration's attention that there is not a legal opinion regarding the retiree rehires resolution that is effective in June. The Board needs to obtain a legal opinion in order to know what course of action to take. They will also need a legal basis in order to direct Ms. Zimmermann.

Ms. Billings said that a legal opinion was prepared by one of the retiree's attorneys stating that the resolution is illegal. Chairman Harrison asked what the Board should do before a legal process takes place. He asked if the Council and the Administration are looking into this issue.

Trustee Cochran said that he does not know if the Administration is looking to obtain a legal opinion. Trustee Scott said that at the last meeting the Mayor said that the Executive Office is getting an opinion.

Chairman Harrison said it is important to obtain an opinion because the Board's administrator has to act and react to the by laws and ordinance resolutions adopted by the legislative body. The Board receives their direction from the legislative body whose authority supersedes that of the Board.

Ms. Billings said that the Board has a fiduciary obligation to act in the best interest of its members and to follow the ordinance. If there are gray areas in the ordinance or there is something administratively not proper or legal it is prudent to provide an opinion to the Council informing them that what they are doing is illegal or inappropriate. The Board has the obligation to do what is legal and proper. You want to avoid any allegations that it is illegal.

Trustee Woods asked if the opinion would be on behalf of the Board. Ms. Billing said the legal opinion would be provided on behalf of the Board. Chairman Harrison said that is why the Board will be paying for their own legal opinion.

Ms. Billings said that she recommends that the Board obtain a legal opinion which would demonstrate that the Board has done their due diligence. In the event a lawsuit is pursued regarding this issue the pension system will likely be named along with the Council.

Trustee Bowman said that when the retirees chose to retire no one guaranteed them a job and they were not disenfranchised. They just cannot work for the City if they are retired.

Ms. Billings said that when the Board did not approve for her to provide an opinion for the City Council she stopped her research and her opinion is a preliminary draft. She wants to make sure that the Board is aware that the retiree's attorney's opinion is that the ordinance amendment is illegal. She said this issue was litigated in the private sector and the US Supreme Court ruled that pension plans could not suspend benefits of reemployed retirees. Because this is a public pension system it is governed by state law and as such the US Supreme Court's ruling would not set precedence, however, it could be persuasive authority. The Board needs to be aware of the legality of the ordinance in order to properly administer it.

Chairman Harrison said that the issue will come back to the Board whether or not there is a legal opinion.

Ms. Billings said that she will have the legal opinion regarding the retire/rehire ordinance amendment completed by the next regular meeting.

**RESOLUTION 08-033** By Cochran, Supported by Scott  
Resolved, That the Board request a legal opinion from counsel regarding the retire/rehire amendment ordinance.

Yeas: 6 – Nays: 0

### **OTHER ISSUES**

#### **Re: Transferring Assets from a Retirement System to Fund Retiree Health Care Costs**

Ms. Billings distributed a legal opinion detailing how a public pension fund can fund retiree health care costs with excess pension assets.

Chairman Harrison said that Ms. Billings will apprise the Board of the 401(h) process. The Police and Fire Retirement System have engaged their legal counsel for an opinion regarding this issue. He feels it is appropriate for the Board to share in the cost of this opinion.

Ms. Billings said that she represents a number of retirement systems and she spreads her research costs among all clients affected by the research. It is only fair for her to combine her time so one system is not responsible for 100% of her costs regardless if the systems are related or not. This also pertains to actuarial contracts and money managers.

The issue is whether it is possible for a municipality to transfer assets of the retirement system to fund retiree health care. IRC Section 420 allows for transfer of assets to a 401(h) account which is a separate account within the pension system that is established to pay for medical benefits for retirees. The assets are not transferred out of the retirement system they are merely separated as a specific line item for accounting purposes.

Chairman Harrison asked how this relates to and affects the VEBA.

Ms. Billings said that Section 420 states that the transfers must be qualified and must satisfy specific funding requirements, use requirements, vesting requirements and minimum cost

requirements. The pension plan must be at a 125% or greater funding level and cannot use the actuarial valuation funding levels. The actuary has to prepare a report to determine funding levels pursuant to IRC Section 412 which require different mortality tables and assumptions.

Trustee Cochran said that he spoke with the actuary who said that they could use the current actuarial market value without smoothing although there are a lot of other factors to consider.

Chairman Harrison said that at the last meeting the Board voted not to use our attorney to give an opinion to the City Council. In turn, the Administration should not be able to use our sources. They should have to come through the Board to get information and opinions. The more visible and transparent this issue is the better it will be. This issue requires a clear understanding that the Board is operating properly with no appearance of conflict. There are processes that should be followed.

Ms. Billings said that under this provision only one transfer for the expected amount of expense is allowed during the taxable year with any excesses transferred back to the retirement system.

Trustee Cochran said that the Administration is trying to show that they are exploring all possible solutions to the deficit problem with the state coming in. He is not necessarily in favor of this action but it accommodates the Administration by exploring all options.

Trustee Woods said that the trustees' responsibility is not to the Administration. Their fiduciary responsibility is to the members of the retirement system. She does not trust the Administration and fears maleficent to the pension fund. It was not the retirement system that caused the City to get into the deficit problem.

Ms. Billings said that Trustee Woods is right that the Board's sole obligation is to the members. The Board needs to know what is legal or not and this memorandum provides that information.

Trustee Bowman asked if this issue would have to go before City Council. Ms. Billings said that this provision would have to go before the Council and has to be negotiated within the collective bargaining units. Trustee Bowman said that he does not believe Council is aware or has knowledge of this issue.

Trustee Scott said that it is in the best interest of retiree healthcare to be able to transfer funds to the VEBA. Healthcare is being cut all the time. As it goes forward there are restrictions to ensure that it is done a certain way, so there is no need to worry.

Ms. Billings said that there is no legal mechanism to transfer funds to the VEBA; funds may only be transferred to a 401(h) account within the system.

Trustee Saucedo asked about the original funding of the VEBA. Ms. Zimmermann explained that there were two contributions made by the City at the start. These are small amounts in comparison to the retirees' healthcare cost which is huge.

Trustee Bowman said he feels that the VEBA Board is responsible to make this decision and the two Boards should remain separate on this issue. Chairman Harrison said that the process had already been engaged to obtain the information. Trustee Bowman said that it is not the responsibility of GERS to go over this. It has to go through Council. Chairman Harrison said that the Board is just getting ahead of the curve.

Trustee Woods said she sees this as one of the catastrophic events that could hurt the funding status per Gabriel, Roeder & Smith. Chairman Harrison said that it could change the over funded status. The Administration is trying to put a band aid on something that needs an operation. He asked where the money would come from if the pension system becomes under funded and the City has to begin funding again. This could be worse in the long-term. Trustee Bowman stated that the City has already transferred funds from the Water and Sewer Fund to the General Fund.

Ms. Billings stated that the Internal Revenue Code addresses the 420 transfer. It states that everyone must immediately become 100% vested in the pension system including those members who terminated employment within one year of the transfer or the IRS will not approve. Healthcare benefits cannot be reduced or negotiated to eliminate eligibility for certain segments of members for five years. Contributions cannot be made to the VEBA for the same health care liability that is funded through the 420 transfer to the 401(h) account. Contributions to fund the benefit under the 401 (h) cannot exceed 25% of the cumulative contributions to the retirement system.

*Trustees Cochran and Bowman left at 10:46 a.m.*

Chairman Harrison asked if the VEBA assets would be depleted. Ms. Billings said that would require additional research, however, it would appear that they would be depleted based on the requirement that assets in the VEBA are considered when determining the amount eligible to be transferred under section 420.

In 2006 two additional provisions were added to the Public Pension Act. The qualified future transfer provision allowed municipalities to prefund for up to ten taxable years for retiree healthcare. If the transfer is done year by year, the funding level of the retirement system cannot fall below 125%. If a qualified future transfer is made, the funding level cannot fall below 120%.

*Trustee Cochran returned at 10:49 a.m.*

Trustee Cochran said that the Administration feels that the funding level excess would be sufficient for up to ten years to relieve the burden of the General Fund. He said that he feels the Board should engage the actuarial study. It would give the Board time to review and explore options not that the Board would act upon the study. The Administration cannot pay or request a specific actuarial study without prior Board approval.

Chairman Harrison said that Trustee Cochran needs to follow the process and the Administrator needs to make that request at the next meeting. It is important to obtain accurate information as soon as possible. He directed the Administrator to add that to the agenda.

Chairman Harrison said that technically those who voted against the last resolution should vote against this resolution. He is not advocating the issue, but he feels that it is pertinent to get more information which in turn allows for more transparency. He is in favor of moving this issue forward.

Ms. Billings said because this issue has to be negotiated it may be a good idea to approach the unions before spending the money for an actuarial study. She also stated that the cost for the actuarial study should be paid by the city and/or unions; it is not a proper expense for the system.

Trustee Woods said that she is concerned that the information conveyed to the Unions could be skewed. Chairman Harrison asked if the information should come from the Retirement Board or the Administration.

Trustee Scott said he was offended that there are those who feel that his department would not convey accurate information. Chairman Harrison apologized for his choice of words but said that when the Administration wants to do something the Union may only hear the Administration's point of view.

Ms. Billings said that all unions would have to agree on the issue of 100% vesting for all members. All unions would have to bargain it and non-union members would require an ordinance amendment. All the unions have to agree in order for the IRS to approve a 420 transfer. Normally, the City Council would have to authorize the contracts.

Trustee Scott said that the City Council is responsible for ratifying contracts but not Memorandums of Understanding (MOU's). MOU's never go before City Council.

Trustee Woods questioned if an MOU had ever been prepared to include an entire collective bargaining unit. Trustee Scott said that there has not been one since he has been with the City: they have only been done for individuals.

Ms. Billings said because this would be a change in benefits, state law would require a cost study to determine the financial impact to the pension system under PA 728.

Trustee Woods said that Trustee Cochran needs to check with the unions to see if they would agree.

Chairman Harrison said that it was good to get the information and for the Board to be brought up to speed.

Ms. Billings said that once the transfer provisions were exhausted, the city could only contribute 25% of the pension contribution to the 401(h) account. If pension contributions were zero, no

contributions could be made to the 401(h) account. They could be starting all over with the VEBA.

Chairman Harrison said that the Board cannot dictate what goes on through the channels. There is no need for fighting and it will be done when it gets back to the Board. It would not be good to start the actuarial process at this time.

The meeting was adjourned at 11:12 p.m.