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## MEMORANDUM

TO: City of Milwaukee Annuity and Pension Board

FROM: Patrick McClain, Assistant City Attorney

DATE: August 22, 2022

RE: Existing Legal Opinions Regarding The Annuity And Pension Board's  
Authority To Establish Compensation or Hire Its Own Employees

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This memo is provided to assist the Annuity and Pension Board in its ongoing discussions regarding the Board's limited ability to set compensation rates for critical ERS staff positions due to restrictions established by city ordinance, as well as the potential fiduciary risks attending this limited flexibility. Please find enclosed, and summarized below, several relevant legal opinions of the City Attorney and outside legal counsel.

- **Milwaukee City Attorney Opinion (May 7, 2002)**
  - *Question:* Whether the Board has any independent authority to establish wages and benefits for ERS employees?
  - *Answer:* No. ERS employees are city employees and are therefore subject to classification by the City Service Commission and limited to the benefits offered by city ordinances.

*(Continued on Next Page)*

- **Milwaukee City Attorney Opinion (November 10, 2003)**

- *Question:* Whether the Board has any independent authority to exceed salary limitations imposed by the city's salary ordinance and to provide vacation benefits in excess of those authorized by applicable ordinances?
- *Answer:* No, but with an important caveat. This opinion expressly reaffirms and supplements the City Attorney Opinion dated May 7, 2002. The ERS is a city agency and its employees are city employees. As such, the ERS is bound to comply with city ordinances governing vacation and pay, including MCO § 350-104 which prohibits a city employee from receiving any additional compensation in excess of that fixed by law. However, because the ERS is also expressly granted the powers of a corporation, the ERS *can* enter into contracts and hire its own employees. These employees would not be city employees and would therefore not be subject to the pay and benefit restrictions noted above. For the same reason, they would likewise be ineligible for city pay and benefits.

- **Legal Opinion, *Whyte Hirschboeck Dudek S.C* (February 12, 2004)**

- *Question:* Whether the Global Pension Settlement ("GPS") granted the Board the authority to establish wages and benefits for ERS employees different from those stated in the city salary ordinance?
- *Answer:* No. This opinion affirmed the conclusions of the City Attorney Opinions dated November 10, 2003 and May 7, 2002, but again with an important caveat. The GPS did not transform ERS employees into non-city employees. The fact that ERS staff wages are now (pursuant to the GPS) paid directly from the ERS trust does not deprive the city of its statutory authority to set uniform rates of pay for "positions in the city service." While the ERS could make an argument that the post-GPS budgeting arrangement placed ERS employees outside the purview of the city's statutory authority, these arguments are relatively weak. Additionally, as a matter of policy, a contrary conclusion would jeopardize the city service protections and ERS membership eligibility currently enjoyed by ERS staff. Finally, consistent with the November 10, 2003 City Attorney Opinion, the Board can exercise its corporate contracting power to hire individuals and entities to perform services for ERS. However, this authority does not allow the Board to exempt individuals who are clearly "employees" of ERS from the compensation limitations imposed by city ordinance. "[A]ll 'employees' of ERS [i.e. subject to the control and supervision of ERS in the performance and scope of their duties] are employees in City service, whether hired through the employment services of the City or directly by the ERS."

- **Legal Opinion, *Reinhart Boerner Van Deuren* (June 21, 2012)**

- *Question:* Does the Board’s inability to manage human capital resources as a result of city compensation restrictions create fiduciary duty liability risks for the Board?
- *Answer:* Yes. ERS compensation rates—especially for critical positions such as Executive Director, Chief Investment Officer, Chief Financial Officer, and Senior IT Manager—are well below market levels. This not only results in substantial unwanted staff turnover but places ERS at a serious disadvantage when recruiting experienced replacements. Moreover, once trained, replacement staff will become vulnerable to poaching by peer organizations capable of offering better compensation.

The ERS’s investment strategy requires uninterrupted management by a high quality investment staff. Additionally, a growing body of academic research indicates that competitive compensation policies are associated with higher investment return. The inability of the ERS to establish competitive compensation levels therefore presents an increased risk to the successful implementation of its sophisticated investment strategy and achievement of forecasted returns. This necessarily creates fiduciary liability risks. Board trustees are under an obligation to both invest trust funds and delegate responsibilities prudently. Implementing a complex investment strategy without simultaneously establishing the level of compensation required to attract and retain competent investment staff could be viewed as a prima facie case for breach of the required standards of care for fiduciaries.

Both the Uniform Prudent Investor Act (“UPIA”) and the Uniform Management of Public Employee Retirement Systems Act (“UMPERSA”) advise that public retirement system trustees be given exclusive authority to establish an administrative budget sufficient to allow performance of the trustees’ duties and to obtain (by employment or contract) the services necessary for prudent delegation. Notably, the State of Wisconsin, after recognizing similar structural deficiencies within the Wisconsin Retirement System in 2011, adopted the UMPERSA model—granting the State of Wisconsin Investment Board (“SWIB”) the authority to establish and monitor its own operational budget. The state additionally transferred all SWIB employees from the classified civil service to the unclassified service, and authorized the SWIB to both create positions and set compensation levels. The city’s failure to take similar remedial action when faced with the same issues would likely be cited in any fiduciary duty litigation against the city and ERS.

If ERS negligence or other breach of fiduciary duties were to result in losses to the trust, the above considerations could be used as evidence to prove liability. The city, as both plan sponsor and under its indemnification agreement with ERS, would be implicated in the litigation. It is therefore recommended that the city and Board confer to develop and implement a resolution.

I am available to discuss these opinions and any related concerns at the Board's convenience. Thank you.

PATRICK MCCLAIN

cc: Bernard Allen, Executive Director

Encl: Milwaukee City Attorney Opinion - May 7, 2002 (1 page)  
Milwaukee City Attorney Opinion - November 10, 2003 (5 pages)  
Legal Opinion, *Whyte Hirschboeck Dudek S.C* - February 12, 2004 (6 pages)  
Legal Opinion, *Reinhart Boerner Van Deuren* - June 21, 2012 (10 pages)