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February 12, 2004

**Via U.S. Mail**

Ms. Anne Bahr  
Executive Director  
Employees' Retirement System  
City of Milwaukee  
200 East Wells Street  
Room 603  
Milwaukee, WI 53202

Re: ERS Wages and Benefits

Dear Ms. Bahr:

The Annuity and Pension Board ("Board") of the Employees' Retirement System ("ERS") for the City of Milwaukee ("City") has retained us to provide guidance on whether the Board has authority to grant wages and benefits to ERS employees which are separate from the position and salary ordinances of the Milwaukee Code of Ordinances ("Code of Ordinances"). You have provided us with copies of ERS requests to the City Attorney for an opinion on this subject and the various responses of the City Attorney, including the City Attorney's opinion letter of November 10, 2003 ("2003 Opinion Letter"), which concludes that ERS does not possess the authority to grant certain wages and benefits to ERS staff in excess of those generally provided to City employees. In connection with our review, we have also considered correspondence between the City Attorney and ERS on February 2, 2002, May 7, 2002, June 28, 2002, July 5, 2002 and February 13, 2003 and the October 22, 1937 opinion letter of the City Attorney, which was attached to the 2003 Opinion Letter.

For the reasons set forth below, we agree with the City Attorney's conclusion in the 2003 Opinion Letter that ERS employees are City employees and that the Code of Ordinances generally limits the wages and vacation benefits of ERS staff. As a result of the changes in the Milwaukee City Charter ("City Charter") under the Global Pension Settlement, one could argue that **the** Code of Ordinances limitations on wages and benefits no longer apply because the ERS staffs wages and benefits are not part of the current City budget. However, we believe that the argument against application of the limitations on wages and benefits is not persuasive and, even

if successful, would jeopardize the benefits of Civil Service protections and ERS membership for ERS staff.

It is our understanding that ERS employees have always enjoyed the benefits, privileges and protections of City employees. These benefits, privileges and protections include, among other things, membership in the ERS, participation in City health and life insurance plans, and the protections of Civil Service employment. In addition, ERS employees have been included on the City's Visual Organizational Inventory and, prior to the changes in the City Charter under the Global Pension Settlement, funds to pay ERS employees have come from the City, as part of the annual City budgets funded by the City's tax levy. These facts are consistent with and support the conclusion that ERS employees are employees in City service.

Although we believe it is clear that employees of ERS are properly considered employees of the City for purposes of wages and benefits, one could argue that the changes in funding of the salaries and wages of ERS employees under the Global Pension Settlement have created a situation where the City does not satisfy the requirements of Section 62.57 of the Wisconsin Statutes, which authorizes the City, as a city of the 1<sup>st</sup> class, to "adopt a uniform and comprehensive salary or wage ordinance, or both, based on a classification of officers, employments and positions in the city service, whether previously so classified or not, if provision has been made in the budget of the current year for the total sum of money required for the payment of the salaries and wages and a tax levied to fund the wages and salaries." Because the authority to adopt a uniform and comprehensive salary or wage ordinance is expressly conditioned in Section 62.57 on "a tax levied to fund the wages and salaries," the fact that the wages and salaries of ERS employees are currently paid from ERS funds and not the City's tax levy permits an argument that the condition of Section 62.57 cannot be met during such period as the wages and salaries of the ERS employees are paid from ERS funds rather than the tax levy.

Despite this argument that the authority to adopt a uniform wage ordinance is conditioned upon the wages being in a current budget supported by a tax levy, there is separate provision of the Wisconsin Statutes which authorizes a uniform rate schedule, namely Section 65.02, which does not contain the express condition of Section 62.57. Section 65.02(5)(d) requires that the City's budget contain "[a] compensation schedule to provide uniform rates of pay for offices and positions in the city service" and Section 65.02(9) requires that the compensation schedule "establish uniform rates of pay for offices and positions in the city service to be in effect for the ensuing fiscal year." As Section 65.02 does not contain the express condition relating to the tax levy, it seriously undercuts the argument that the tax levy condition in Section 62.57 precludes an application of the uniform rates of pay to all employees in City service.

There is another problem with the argument that uniform wage ordinance does not apply to ERS employees because ERS wages are paid from ERS funds and not the City's tax levy. Most of the funds in the ERS are the result of contributions by the City, which are attributable to prior tax levies. As earnings and capital appreciation of the ERS funds are derived from these

City contributions as well, it can be argued that most of ERS funds are ultimately from the tax levy or accumulations from the tax levy. Thus, the argument that ERS funds are not supported by a tax levy (causing a failure of the condition of Section 62.57) can be refuted by the fact that the wages and salaries of ERS staff members are actually being paid for the most part from tax levied funds even though they are not from the current tax levy.

The Board should consider carefully the potential consequences of adopting the position that ERS employees are not subject to the position and salary ordinances because they are not "City employees." If ERS employees are not considered City employees or "employees in city service," they will not be entitled to all of the benefits, privileges and protections of City employees. For example, Section 36-03 of the City Charter, which governs the ERS, provides that "employees" are eligible for membership in the ERS. City Charter Section 36-02-13 defines "employee" as any person whose name appears on a regular payroll of the city or city agency and Section 36-02-8 defines "city agency" as any board, commission, division, etc. of the city government by which "an employe of the city or city agency is paid". Section 36-02-8 of the City Charter **also** specifically provides that an annuity and pension board under Chapter 66 of the Wisconsin Statutes is a city agency. If ERS employees are not City employees or City agency employees, then they are not eligible for membership in the ERS. Thus, if the Board desires to maintain the eligibility of its employees for membership in the ERS, as well as for other benefits and protections offered by the City, it must find a basis on which to conclude that ERS employees are subject to the rules governing City employees for some purposes (such as Civil Service employment protections and eligibility for membership in ERS) but not others (such as vacation and salary limitations found in Subchapters 5 and 7 of Chapter 350 of the Code of Ordinances).

The problem with such an argument is that Chapter 350 of the Code of Ordinances, which governs Employee Regulations and Benefits for City employees, uses the same standards for applicability of its limitations on vacations and salaries as are found in Chapter 36 of the City Charter for membership in the ERS. To say that ERS employees are City employees for purposes of Chapter 36 of the City Charter but not for purposes of Chapter 350 of the Code of Ordinances would require inconsistent interpretations of the same standards in different sections of the City's ordinances.

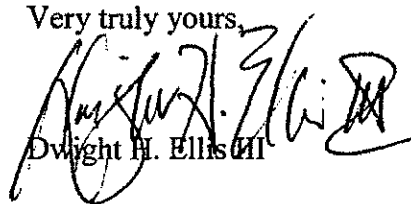
While the City Attorney has concluded that ERS employees are employees in City Service and that ERS does not have authority to grant additional items of compensation in excess of compensation generally provided to City employees, the 2003 Opinion Letter also suggests that the ERS does have authority to "hire its own employees, either by contract or directly" and that these employees "would not be city employees . . . [and] their pay and benefits would not be subject to the restrictions noted above." To the extent that this statement of the 2003 Opinion Letter recognizes the authority of ERS to make contracts and hire individuals and entities to perform services for ERS, such as attorneys, consultants, and other independent contractors, and that such individuals and entities are not entitled to the benefits, privileges and protections of

City employees, we agree. However, if the City Attorney is suggesting that the pay and benefits of individuals who are clearly "employees" of ERS (e.g. subject to the control and supervision of ERS in the performance and scope of their duties) may be exempt from the restrictions of the City Charter's limitation on wages and benefits if hired by contract or directly by ERS, we do not agree. We believe that all "employees" of ERS are employees in City service, whether hired through the employment services of the City or directly by the ERS.

In conclusion, we agree with the opinion of the City Attorney that the Board does not have authority to grant certain wages and benefits to ERS employees without complying with the position and salary ordinances of the City. ERS is a corporate entity created pursuant to the City's home rule authority of the Wisconsin Statutes, but it has been consistently administered as a department or agency of the City since 1937. The fact that the wages and salaries of ERS employees have been paid from ERS funds since the effective date of the Global Pension Settlement allows an argument to be made about the application of Section 62.57 authorizing the City's uniform and comprehensive wage ordinances, but the facts that there is another Wisconsin Statute which requires the City uses a uniform compensation schedule (without the same condition as Section 62.57) and that most of ERS funds have originated from tax levied revenues undercut that argument. Attempts to have ERS employees treated as employees not in City service (in order to exempt them from the position and salary ordinances) would jeopardize other benefits, privileges and protections which ERS employees enjoy as City employees, including Civil Service protections and membership in the ERS itself.

If you or the Board have any questions regarding our guidance in this matter, I would be happy to meet with you or the Board to discuss this in greater detail.

Very truly yours,



Dwight H. Ellis III

dhe/

cc: James W. Greer



City of Milwaukee  
Employees' Retirement System

Anne M. Bahr  
Executive Director

Jennifer A. Shannon, CFA  
Chief Investment Officer

Martin Marson  
Deputy Director

May 14, 2003

Mr. James W. Greer, Esq.  
WHYTE, HIRSCHBOECK & DUDEK, S.C.  
111 East Wisconsin Avenue, Suite 2100  
Milwaukee, WI 53202-4894

RE: ERS Wages and Benefits

Dear Mr. Greer:

Many of the staff positions in the Employees' Retirement System are not subject to the City's tax levy. But rather, their salaries are paid from the retirement fund. On February 2, 2002, the Employees' Retirement System ("ERS") requested legal guidance from the City Attorney's Office regarding the authority of ERS to grant wages and benefits to employees of this office above and beyond those set forth in the City's position and salary ordinances. The City Attorney advised on May 7, 2002 that all employees of ERS are City employees, their benefits are established and paid through the City's Salary Ordinances. Therefore, ERS does not have independent authority to grant its employees benefits separate from those recognized for other City employees.

At the June 24, 2002 meeting of the Annuity and Pension Board, the May 7, 2002 legal opinion was held. A request on June 28, 2002 was made by ERS to the City Attorney for approval to retain outside legal counsel to examine this issue. However, the City Attorney denied the request on July 5, 2002. A copy of the City Attorney's denial was placed on the Board's agenda after discovering that ERS did not receive the response written in July. On March 24, 2003, the Pension Board voted to retain outside legal counsel for guidance on the issue of the Annuity and Pension Board's authority to grant certain wages and benefits to its employees separate from the position and salary ordinances. Enclosed are copies of ERS opinion requests and City Attorney legal opinions for your review. The City Attorney's Office has verbally indicated their intent to provide ERS and the Board with additional guidance and background information on this matter. If this information is forthcoming, we will forward it to you as part of your review.

If you have any questions, please do not hesitate to contact me directly at 286-

Mr. James W. Greer  
May 14, 2003  
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5454. Thank you in advance for your assistance in this matter.

Very truly yours,

Anne M. Bahr  
Executive Director

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Encl.

cc: Annuity and Pension Board