

November 3, 2004

Ms. Anne M. Bahr
Executive Director
Milwaukee Employes' Retirement System
Room 603 – City Hall

Re: Social Security Benefit

Dear Ms. Bahr:

This opinion is in response to your request of June 10, 2003. You asked us to review prior opinions dating back to February 19, 2001. The opinions concern the appropriate payback age for members who elect under § 36-06-5-a-2 to receive increased pension payments before they become eligible for social security benefits, and reduced payments after they become eligible for social security benefits.

Section 36-06-5-a-2 provides:

Until the effective date of any service retirement, any coordinated plan member may elect to convert the allowance otherwise payable on his account after retirement into a retirement allowance of equivalent actuarial value of such amount that, with his social security benefit he will receive, so far as possible, approximately the same amount per year before and after the commencement of such benefit.

Under this provision, the pension amount received before and after receiving social security is adjusted so that the total amount received before and after the commencement of social security payments remains approximately the same. This is accomplished by actuarially calculating the increased amount of pension payments prior to commencement of social security, and the decreased amount of pension payments after the

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commencement of social security. The before and after payments are calculated so that the annual increased pension amount paid before the commencement of social security payments is approximately equal to the reduced annual pension amount plus the social security amount paid after the social security payments commence (increased pension = reduced pension + social security). The date a retiree's allowance is reduced is called the payback adjustment date.

Your question asks whether the correct pension adjustment date is the date a retiree qualifies for a reduced social security allowance, age 62, or the date the retiree qualifies for an unreduced social security allowance, ages 65 to 67, depending on the retiree's birthday. The question arises because § 36-06-5-a-2, quoted above, uses the term "social security benefit," which is defined in § 36-02-31 as "the *unreduced* old-age insurance benefit provided under the social security act." (Emphasis supplied).

In response to your February 19, 2001 opinion request, our office on March 26, 2001, informed you that the payback adjustment date is the day that a retiree's unreduced social security benefits commences (ages 65-67), that the member cannot choose a different payback adjustment date, and that a member might be able to choose to receive a reduced social security benefit, for example, at age 62, before the payback adjustment, which would remain at ages 65-67.

On June 5, 2002, the ERS pointed out a conflict between the March 26, 2001, opinion, and the ERS's administrative practice. Accompanying the ERS's letter was a letter from ERS's actuary, Buck Consultants, explaining and illustrating the consequences of selecting different payback adjustment dates. Buck's letter explains that when a member selects the pension advance option, the calculations assume that the member would begin collecting social security at age 62, and further assume that payback adjustment would be made on that date. This practice conflicts directly with the March 26, 2001, opinion, which, if applied, would require ERS to use the age at which unreduced social security benefits are payable as the payback adjustment date (ages 65-67, depending on the birth date). Buck also pointed out that an age 65 to 67 payback commencement age is less favorable to retirees because the Social Security Administration's early retirement factors are more favorable to the retiree than the ERS's actuarial equivalent factors. Consequently, retirees who choose an age 62 payback adjustment date, receive higher

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retirement benefits than those who choose 65 or higher, all other factors being equal. Of greater importance to the issue at hand, however, Buck pointed out that a 65 to 67 payback adjustment date defeats the purpose of the pension advance. A member who receives social security at ages 65-67 would receive a sharp increase in income at age 62, but would receive sharper decrease in income at ages 65-67, thereby defeating the purpose of the scheme to provide a level stream of retirement income.

The issue was addressed again on August 28, 2002, when our office pointed out that § 36-06-5-a-2 uses the term “social security benefit,” which is defined by § 36-02-31, as “the *unreduced* old-age insurance benefit provided under the social security act.” (Emphasis supplied). Accordingly, our office opined that Chapter 36 requires the ERS to use the unreduced social security benefit in determining the amount of the advance. The opinion suggested revision to the language of § 36-02-31 to permit calculating the amount of the advance based upon the reduced social security benefit available at age 62. The proposed amendment created an option to avoid an impairment of claim issue.

You have requested that we reconsider the August 28, 2002, opinion.

The purpose of Charter § 36-06-5-a-2, is to assure a level, and not fluctuating, retirement income. To effectuate this purpose, the ERS’s utilizes age 62 (the commencement age for reduced social security benefits) as the payback-adjustment date. This practice appears to conflict with the definition of “Social Security Benefit” contained in Charter § 36-02-31, which instead mandates utilization of the commencement age for “unreduced” social security benefits (*i.e.*, ages 65-67) as the payback adjustment date, and with prior opinions of this office on the subject described above.

We believe the ERS’s practice is consistent with the intent of § 36-06-5-a-2, which is to assure a level stream of retirement income. Strictly adhering to Chapter 36’s definition of “Social Security Benefit,” therefore, is not consistent with the intent of § 36-06-5-a-2, because to do so would result in fluctuating, not level, stream of retirement income.

Section 36-02, which is the preface to the section entitled “Definitions,” states, “Except where the context plainly requires different meanings, the following words and phrases shall have the following meaning...” The term “Social Security Benefit,” therefore,

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means “the unreduced old-age insurance benefit... provided under the social security act,” unless the “context plainly requires a different meaning.”

A leading expert in the field of statutory construction described the law governing the meaning and application of definitions as follows:

As a rule a definition which declares what a term means is binding upon the court. Limitations have been noted. For example, if the definition is arbitrary, creates obvious incongruities in the statute, *defeats a major purpose of the legislation* or is so discordant to common usage as to generate confusion, it should not be used.

(Emphasis added). Norman J. Singer, *Statutes and Statutory Construction*, §47:07 (6th ed. 2000)

Except for the definition (which appears in § 36-02-31), the terms “social security benefit,” and “social security benefits” appear in § 36-06 only. This section was created to coordinate the city’s plan with the Social Security Act. In 1958, the ERS established a coordinated plan that allowed members to become eligible to collect social security benefits in addition to their pension benefits. As part of the combined plan, the City adopted certain limits upon the combined ERS and social security benefits. For example, under § 36-06-9, the combined pension and social security benefit of employees who retired between December 28, 1995 and December 31, 1998, could not exceed an amount greater than 85% of their final average salaries. Different limitations in effect at different times are stated in §§ 36-06-9 and 10. The limitations were abolished in 1989 and replaced with a 70% of final average salary limitation, excluding social security benefits. § 36-06-10-f.

The definition of “social security benefit” as “the unreduced old-age insurance benefit” makes sense in the context of administering the limitation on combined pension and social security income. For example, when the 85% limit was in effect, the ERS reduced the pension allowance of retirees so that the retiree’s unreduced social security benefit combined with the retirees’ pension benefit would not exceed 85%. The calculation used the unreduced social security benefit even if the retiree had elected a reduced benefit. It

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did not matter, therefore, if the retiree received an unreduced benefit (ages 65-67) or a reduced benefit (age 62). In either case, the combined pension and the calculated unreduced social security benefit could not exceed 85% of the final average salary.

The definition of “social security benefit” as the “unreduced old-age insurance benefit,” however, does not make sense in the context of determining the payback adjustment date. According to the ERS’s actuary, applying the definition to determine the payback adjustment date defeats the major purpose of the section—providing to retirees level streams of income.

We conclude, therefore, that the definition of “social security benefit” stated in § 36-02-31 does not apply when determining the payback adjustment date. Nevertheless, for purposes of clarity and to avoid confusion in the future, we recommend that the language of § 36-02-31 should be changed to reflect the

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intent of §36-06-5-a-2, and have enclosed an amendment of § 36-02-31 making the change.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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Deputy City Attorney

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enclosure
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