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December 8, 2011

Alderman Michael Murphy
10th Aldermanic District
Room 205 – City Hall

Re: Changes in Pension Benefits Accrual Rates for Elected Officials

Dear Alderman Murphy:

This opinion is in response to your question whether it is legally permissible to legislatively mandate the reduction of pension accrual rate from 2.5% to 2.0% following the next election in April 2012 for current members of the Employes' Retirement System (ERS) who are elected officials and who are re-elected this spring.

Chapter 36, section 36-03, defines who is a member of the ERS. In reference to elected officials, it states:

> 1. Eligibility. **The following shall be eligible to membership in the system:**
>
> a. Any employe who is entitled to and who elected membership at the time of the creation of the retirement system, or
>
> b. Any person who becomes an employe after January 1, 1938, and who is eligible under the provisions of this act and who shall satisfy the following conditions:
>
> b-1. Who is a full time employe; or
>
> b-2. Who is a part-time employe who is eligible for membership under rules and regulations adopted by the board; or
>
> **b-3. Elected officials who have evidenced their intention to join the system. (Emphasis supplied.)**

Termination of membership is governed by section 36-03-5, which states:

> Should any member in a period of 10 consecutive years after last becoming a member be absent from service a total of more than 5 years, except as provided in ss. 36-04-1-b [military leave] and 36-05-6-b-2 and 6 c and d [deferred retirement], or should he become a beneficiary as a result of his contributions under this act or die, or should he withdraw his accumulated contributions, he shall thereupon cease to be a member.

These ordinance sections provide that an elected official who elects to join the retirement system becomes a member of the Employes' Retirement System. In reference to the continuation of an official's membership, Chapter 36 makes no distinction between elected officials and other employees who are members. Membership continues after separation from employment unless the person is absent from service for a total of more than five years during a period of 10 consecutive years, retires, dies, or withdraws his or her accumulated contribution. An authorized military leave is not counted in calculating the five year absence. And a person who separates from service before reaching minimum service retirement age and elects a deferred retirement allowance remains a member until he or she retires, dies, or withdraws his or her accumulated contribution.

Based upon these unequivocal terms of Chapter 36, an elected official's membership in the retirement system continues whether the official is re-elected or not re-elected. There is no provision in the ordinance that states or implies that an elected official's membership is coextensive with his or her term of office.

Unlike employees, however, elected officials are elected to four-year terms of office and must stand for re-election and be re-elected to continue their employment. General employees serve no terms but are subject to dismissal or layoff at any time. Nevertheless, general employees have an expectation of continued employment that is grounded in civil service rules, whereas elected officials have an expectation of a four-year term. This difference between the nature of elected officials' terms of employment and those of general employees raises questions whether elected officials' pension benefit contracts may be modified during one term so as to change the benefit at the commencement of the next term in the same way that elected officials' salaries can be changed from one term to the next. Because there is no specific case-law guidance on this issue in

the context of Chapter 36, the question should be answered by applying the rules governing the interpretation of ordinances.

In interpreting an ordinance, the rules of statutory construction are used. *Schroeder v. Dane County Bd. of Adjustment,* 228 Wis. 2d 324, 333, 596 N.W.2d 472 (Ct. App. 1999). The primary source for construction of a statute is the language itself. *State v. Consolidated Freightways Corp,* 72 Wis. 2d 727, 242 N.W.2d 192 (1976). When we are asked to apply an ordinance whose meaning is in dispute, therefore, we direct our efforts at determining what the legislative body intended the ordinance to mean. *Truttschel v. Martin,* 208 Wis. 2d 361, 365, 560 N.W.2d 315 (Ct. App. 1997). "[I]f the language used in the [ordinance] is capable of more than one meaning, this court will determine legislative intent from the words of the [ordinance] in relation to its context, subject matter, scope, history, and the object which the [legislative body] intended to accomplish." *Id.* at 365-66, 560 N.W.2d 315. But if the language of the ordinance is unambiguous, we go no further. *Id.* at 208 Wis. 2d 365-66, 560 N.W.2d 315. When interpreting pension plans, there is an added twist: "pension laws should be liberally construed in favor of the persons intended to be benefited thereby." *Di Dio v. Milwaukee Public School Teachers ' Annuity and Retirement Fund,* 38 Wis. 2d 261 (1968); *Rehrauer v. City of Milwaukee*, 2001 WI App. 151, ¶ 15, 246 Wis.2d 863, 874, 631 N.W. 2d 644, 649.

Applying these rules of interpretation to the language of Chapter 36 quoted above, it is clear that the expectations of elected officials in reference to the terms of their employment do not limit their contractual rights to their pension benefits. Their rights are based on their status as members and not their status as elected officials. Moreover, the fact that elected officials serve from term to term does not affect their rights as members of the retirement system because there is no connection between membership in the retirement system as defined in Chapter 36 and separation from employment nor continuation of employment. As noted above, membership in the retirement system continues after employment terminates until one of the conditions stated in sec. 36-03-5 has been met.

In light of the unequivocal language in Chapter 36 tying the rights of elected officials to membership, we do not believe we can reasonably conclude that term

expirations alone severs the contractual relationship absent explicit language in Chapter 36 so stating.

We have been asked whether a reduction in an elected official's accrual rate would be considered a substantial impairment. Reducing the accrual rate for elected officials from 2.5% a year to 2.0% is a 20% reduction in the accrual rate. The effect of the proposed change varies depending on the official's length of service. For example, an elected official serving five terms (20 years) would earn a benefit equal to 50% of final average salary at the 2.5 rate, as opposed to 40% at the 2.0 rate, a 20% reduction. To reach the maximum benefit of 70% of salary, a member must work 35 years at the 2.0 rate, compared to 28 years at the 2.5 rate—a difference of seven years. On page 12 of our opinion of February 28, 2011, we cite numerous cases holding that a reduction in wages or benefits of a much smaller magnitude than proposed here constitutes a substantial impairment. Accordingly, we conclude that a 20% reduction in the accrual rate would be held to be a substantial impairment.

If applied to all 22 elected official, the change would reduce the City's costs by approximately $24,000 annually. The saving is so small that it does not provide the basis for an argument that the change is necessary to save the financial viability of the pension system. It should be noted that the purpose of state law requiring employee paid contributions was to assist the state in dealing with its budget shortfall, and had nothing to do with the funded status of the Employee's Retirement System. Moreover, whether the contribution is paid by the elected official or the official does not affect the funded status of the pension system.

Finally, we have been asked whether the state law itself justifies the impairment of the contractual and property rights of members. It is well established that "[c]onduct by persons under color of state law which is wrongful under 42 U.S.C. sec. 1983 cannot be immunized by state law." *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980). Compliance with state law sometimes affects the qualified-immunity analysis, but qualified immunity is a defense only to a damages claim, not a claim for injunctive or declaratory relief. *Welch v. Theodorides-Bustle*, 753 F. Supp. 2d 1223, 1227 (N.D. Fla. 2010) (noting that if compliance with state law were a defense, schools would still be segregated.).

We note that in 1995, the accrual rate for elected officials serving after January 1, 1996, was reduced from 2.6% to 2.5%. Section 36-05-1-g. This change was made to comply with IRS regulations. Additionally, this change was made prior to the decision in *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 571 N.W.2d 459 (Ct. App. 1997), which held that the contractual and vested rights accruing to ERS members are those in existence on the date of commencement of membership. *Id.* 214 Wis. 2d at 488, 494-95, 571 N.W.2d at 461-62, 463. The *Welter* case did not involve elected officials; however, as explained above, Chapter 36 makes no distinction between the contractual and vested rights of elected official and those of employees.

In conclusion, we do not believe that it would be legally permissible to legislatively mandate the reduction of pension accrual rates from 2.5% to 2.0% following the next election in April 2012 for current members of the Employes' Retirement System (ERS) who are elected officials and who are reelected this spring. The reductions in accrual rates, however, could be implemented with the consent of the incumbent members and imposed on newly elected members unilaterally.

Very truly yours,

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RMK:lmb
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