

The State of South Carolina



T. Travis Medlock
Attorney General

Attorney General

803-734-3970
Columbia 29211

August 11, 1987

Andrew Shealy, Chief of Police
City of Newberry
Post Office Box 157
Newberry, South Carolina 29108

Dear Chief Shealy:

With respect to the rate of employer contributions made to the Police Officers Retirement System, you have asked whether the Budget and Control Board would have the authority to rescind its recent action of lowering employer contributions to the System by about three percent (3%). Based on the following, it is the opinion of this Office that there is no legal prohibition against the Budget and Control Board taking action to rescind its previous action.

Section 9-11-220(1), Code of Laws of South Carolina (1976, as revised), provides:

Commencing as of July 1, 1974, each employer shall contribute to the System seven and one-half percent of the compensation of Class One members in its employ and ten percent of compensation of Class Two members in its employ.. Such rates of contribution shall be subject to adjustment from time to time on the basis of the annual actuarial valuations of the System. [Emphasis added.]

The Budget and Control Board is expressly authorized to adjust the percentages of contribution "from time to time." The phrase "from time to time" means occasionally, or as the occasion requires. State v. McBride, 29 Wash. 335, 70 P. 25 (1902) (law authorizing legislature to increase number of Supreme Court judges from time to time did not mean that legislature could not decrease the number of judges after an increase). The words also mean "at intervals" or "now and then." Union Const. Co., Inc., v. Beneficial Standard Mortg. Investors, 125 Ariz. 433, 610 P.2d 67, 72 (Ariz. App. 1980).

Mr. Andrew Shealy
August 11, 1987
Page 2

When the Police Officers Retirement System was established by Act No. 799 of 1962, section 15 of that act required that the employer contributions to the System be determined each year on the basis of the annual actuarial valuations of the System. This was amended by Act No. 937 of 1974 to read as cited above. We further note that Sections 9-1-1170, 9-8-140, and 9-9-130 of the Code require that contributions to the South Carolina Retirement System, Retirement System for Judges and Solicitors, and Retirement System for Members of the General Assembly respectively, be determined "each year" on the basis of annual actuarial valuations of the respective system. The amendment of Section 9-11-220 to permit adjustments "from time to time" in employer contributions to the Police Officers Retirement System thus becomes even more significant.

To restrict adjustments to only an annual basis disregards the 1974 amendment permitting adjustments "from time to time" and does not give effect to apparent legislative intent. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Such an interpretation would also result in the legislature having done a futile act, State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964), which result should be avoided if possible. The plain meaning of the statute would also be departed from. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980).

It could be argued that the language of Section 9-11-230(1) of the Code mandates an annual determination to be made by the Budget and Control Board; the provision states in relevant part:

At the beginning of each year commencing on the first day of July, the Board shall certify to each employer other than the State the amount of employer contributions due the System. ...

This statute does not place a limitation on the action permitted to be taken by Section 9-11-220 of the Code but does require the Budget and Control Board to certify to each contributing employer, at the beginning of each fiscal year beginning on July 1, the amount of employer contribution due at the rate presently in effect.

To summarize the foregoing, the Budget and Control Board is given the flexibility by Section 9-11-220 to adjust the rates of employer contributions to the Police Officers Retirement System upon occasion, as may be necessary. The Board is not restricted to an annual determination with respect to the Police Officers

Mr. Andrew Shealy
August 11, 1987
Page 3

Retirement System as it would be for the other systems. Thus, it is our opinion that there is no legal prohibition against the Budget and Control Board rescinding or otherwise modifying its earlier action with respect to employer contributions to the Police Officers Retirement System, based on the "annual actuarial valuation" of the System.

A related question is whether the Budget and Control Board could delay putting a change in employer contributions into effect. There may be reasons for delay, based upon policy considerations unknown to this Office, or perhaps due to a factor such as the actuarial report not being ready for use at the very beginning of the new fiscal year. If the Budget and Control Board is not prepared to implement an adjustment at the beginning of the fiscal year, applicable law does not appear to prohibit delay.

By way of contrast, the Retirement System for Judges and Solicitors requires that contributions of the State to that System be determined annually on the basis of annual actuarial valuations by the System; further, the employer contribution is to be remitted to the System "within thirty days after the beginning of each fiscal year," by Section 9-8-140 of the Code. In such a case, delay by the Board would not be warranted; the statutes applicable to the Police Officers Retirement System are not so stringent as Section 9-8-140, however.

The role of the actuary in the process of determining employer contributions must also be considered. It is the opinion of this Office that the actuary designated by the Budget and Control Board to evaluate the Police Officers Retirement System is to serve as a technical adviser to the Board, which is responsible for administration and proper operation of the System and adoption of rules, regulations, mortality and other necessary tables, interest rates, and so forth.

The Budget and Control Board is authorized by Section 9-11-30 of the Code to engage, inter alia, actuarial services. That section provides further:

(4) The Board shall designate an actuary who shall be the technical adviser of the Board on matters regarding the operation of the System and shall perform such other duties as are required in connection therewith and shall be a member of the American Academy of Actuaries.

Mr. Andrew Shealy
August 11, 1987
Page 4

(5) At least once in each five-year period following the date of establishment, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the System and shall make a valuation of the contingent assets and liabilities of the System and the Board, after taking into account the results of such investigations and valuations, shall adopt for the System such mortality, service and other tables as shall be deemed necessary.

(6) On the basis of regular interest and tables last adopted by the Board the actuary shall make an annual valuation of the contingent assets and liabilities of the System.

* * *

It would appear that the role of the actuary is basically advisory in nature. The Budget and Control Board is charged with responsibility to adopt mortality, service, and other tables which have been established according to the required investigation. Based on those tables, the actuary would annually evaluate the contingent assets and liabilities of the system, which the Board would then utilize to make any adjustments to employer contributions required from time to time. The Board retains ultimate responsibility to act upon the findings of the actuary.

To reach a contrary conclusion would be tantamount to placing the Budget and Control Board in a ministerial position and could amount to an unlawful delegation of authority. Determining the percentage of employer contributions appears to be a legislative or policy-making matter rather than a ministerial function, which determination has not been delegated to the actuary by the General Assembly. 1 Am.Jur.2d Administrative Law §101. Thus, such determination should remain a responsibility of the Budget and Control Board using the annual actuarial valuation (as the technical advice of the actuary in that instance). The role of the actuary, rather than the Budget and Control Board, is ministerial in that instance, in keeping with the advisory nature of the actuary contemplated by Section 9-11-30(4) of the Code.


Mr. Andrew Shealy
August 11, 1987
Page 5

The Police Officers Retirement System is viewed as a trust fund, with the Budget and Control Board designated the trustee by Section 9-11-240(1). It is well established that modifications or adjustments in an employee pension fund must be reasonable, that is, they must bear some material relation to the theory of a pension system. Miller v. State, 557 P.2d 970, 975 (Cal. 1977). The principal requirement is that any alteration must be equitable to the employees affected. 67 C.J.S. Officers § 245. Accordingly, we believe that it is within the Board's discretion to require a rate of employer contributions, at least for a limited period, which is greater than that suggested by the annual actuarial valuation 1/.

In conclusion, it is the opinion of this Office that the Budget and Control Board has the authority to rescind its recent action lowering the rate of employer contributions to the Police Officers Retirement System by about three percent (3%) or to delay putting such a change in effect. While the actuary designated by the Board would prepare the annual actuarial valuation, the Board itself retains the ultimate responsibility to act upon the findings of the actuary. We believe that it is within the Board's discretion to require a rate of employer contributions, at least for a limited period, which is greater than that suggested by the annual actuarial valuation.

With kindest regards, I am

Sincerely,



T. Travis Medlock
Attorney General

TTM/rhm

1/ Of course, while the Board enjoys considerable discretion in determining appropriate rates of contribution, the amount of retained reserves in the System must be in conformity with the federal tax laws.