



OFFICE OF CORPORATION COUNSEL

Client-Driven. Community-Focused.

MARGARET C. DAUN
Corporation Counsel

PAUL D. KUGLITSCH
ANNE B. KEARNEY
Deputy Corporation Counsel

ALAN M. POLAN
KATHRYN M. WEST
DALE R. NIKOLAY
SCOTT F. BROWN
TEDIA K. GAMIÑO
DAVID N. FARWELL
LISA M. PROCACCIO
NELSON W. PHILLIPS III
MELINDA S. LAWRENCE
Assistant Corporation Counsel

DATE: March 8, 2019
TO: Milwaukee County Board of Supervisors
Interested Stakeholders
FROM: Corporation Counsel Margaret C. Daun
SUBJECT: Resolution in File No. 18-802

Over the past two months, elected officials asked the Office of Corporation Counsel (OCC) to address specific questions from the public regarding various proposed amendments to pension ordinances contained Milwaukee County Ordinances 201.24, as put forward in File No. 18-802.

This memorandum, which may be added to File No. 18-802, responds to each question as completely as possible. Below please find ten questions, ten responses, ten follow-up questions, and ten follow-up responses. Each question begins a new page.

Please note that the questions and follow-ups received from the public are included verbatim, without correction of errata or removal of first person usage.

Finally, as expressly noted below, many responses involve subject matter outside the expertise of the OCC and therefore, were crafted with the assistance of the Milwaukee County Office of the Comptroller.

QUESTION 1: Does Milwaukee County Ordinance section 201.24(8.17) (Ordinance File # 16-69) require the Milwaukee County Board to submit a new fiscal analysis to the Pension Board in order for the Pension Board to revise its formal comment dated December 11, 2018 (see letter here) in light of the County Board Finance Committee's vote on February 1, 2019 to approve an amendment proposed by Supervisor Schmitt (Schmitt Amendment) that could require the transfer of millions of dollars annually from the ERS Trust to a fund controlled by the County Board, that would drastically alter the fiscal analysis previously approved by the Director of Performance, Strategy and Budget, that could change the required actuarial analysis that was provided to the Pension Board; and that was adopted after the Pension Board submitted its formal comment under sections 201.24 (8.5) and (8.17)(a)?

ANSWER 1: Per the Comptroller, “The amendment that was made by the County Board Finance and Audit Committee on February 1, 2019 was a clarification from the Comptroller’s Office on the flow of funds between the Employee Retirement System and Milwaukee County. Since the Comptroller office prepared the fiscal note and requested the actuarial analysis, such flow of funds, as provided for in the amendment was already considered. Thus, such amendment has no impact on the fiscal analysis or the actuarial analysis. The amendment clarifies that any repayments made by members to ERS for previous overpayments would be a reduction in the annual pension contribution by Milwaukee County. The reduction in the annual pension contribution would be made up by the repayments made by members, thus, the retirement plan is made whole.”

Also, the Director of Performance, Strategy, and Budget confirmed that he reviewed the pension amendment package.

FOLLOW-UP 1: Respectfully, Corporation Counsel should be the one to offer the legal analysis on this issue, and it is telling that you chose to allow a non-lawyer to answer that question. Since Steve Cady could not have reviewed the pension amendment package prior to his approval of the Comptroller's fiscal analysis, I don't understand how that is relevant here, but I would definitely appreciate it if he would share his current views on the topic.

Regardless, the actual question raised wasn't addressed -- If the the Pension Board wanted to vote to submit a formal comment on the ordinance changes as amended, could they do so if the Comptroller does not submit an approved fiscal analysis (and request a new actuarial analysis) of the ordinance changes as amended? Nothing in your response changes the fact that the answer to that is no.

FOLLOW-UP RESPONSE 1: The language change was drafted cooperatively by the Comptroller and the OCC, with the assistance of Mr. Cady, to clarify what was in the original resolution. The amendment adopted on February 1, 2019 did not make any substantive change, it merely clarified the language.

If the Pension Board wishes to comment, of course the Pension Board may do so. There is a fiscal analysis (and actuarial analysis) already attached to File 18-802.

QUESTION 2: What was the basis of the authority claimed by the Pension Board and Retirement Plan Services to submit the 2014 Voluntary Correction Plan supplement (see here) and begin vigorously pursuing all pension overpayment errors (regardless of the category of error that caused the overpayment)?

ANSWER 2: Correct benefit payments are legally required. The IRS's Employee Plans Compliance Resolution System (EPCRS) is the process designated by the IRS to remedy plan calculation mistakes and avoid consequences of plan disqualification and ideally, to avoid a costly, time-consuming audit. A correction for a mistake should be reasonable and appropriate. The correction method should resemble one already provided for in the Internal Revenue Code and plans should consider all facts and circumstances. Revenue Procedure 2018-52 is the guidance governing the EPCRS program. There are two ways to correct mistakes under EPCRS, applicable to Milwaukee County:

- (1) The Self-Correction Program (SCP) - permits a plan sponsor to correct certain plan failures without contacting the IRS or paying any fee.
- (2) The Voluntary Correction Program (VCP) - permits a plan sponsor to, any time before audit, pay a fee and receive IRS approval for correction of plan failures.

When systemic benefit calculation errors are uncovered, as was the case for the County's pension, the Pension Board has the discretion and obligation, as fiduciaries, to elect either a Self-Correction Plan OR a Voluntary Correction Plan. The County, as plan sponsor, has an obligation to act to ensure that the pension plan retains its tax qualified status. The Pension Board selected and the County Board agreed to use a VCP to correct errors. This is not only perfectly legal, but a correction plan (either SCP or VCP) is *required* for any fiduciary when faced with errors such as those uncovered in the County's plan and it is *required* for a sponsor when faced with errors such as those here to preserve the plan's tax qualified status. There is no particular authorization to "permit" this beyond the requirement under governing IRS regulations to pay correct benefits and the noted Revenue Procedures.

In summary, as explained above, either an SCP or VCP was mandated given the errors. The Pension Board's and County's duty to adopt an SCP or VCP is inherent in the Pension Board's fiduciary duties and in the sponsor's inherent obligation to work to continue to ensure a plan is tax-compliant.

Furthermore but separately, under the EPCRS program, the IRS requires a plan to be made whole for all overpayments. *See* Rev. Proc. 2018-52, Section 6.06(3). Absent an agreement in an ordinance adopted by the sponsor (i.e., the County) to direct the Pension Board otherwise regarding overpayment (i.e., that the County would pay), the Pension Board and RPS have no option but to collect overpaid amounts from members. This is the current state. This obligation arises from both a trustee's obligation as a fiduciary to look out for the trust as a whole, as well as the interest of all pension fund members equally, as well as the IRS requirement that correct benefit payments

be paid. When one member is overpaid, other members suffer because the trust has been depleted. This is part of longstanding jurisprudence of trusts, fiduciary duties, and pension law. This Ordinance package provides some relief to members in repaying the overpayments by creating an option where the County immediately makes the trust whole (if the option is elected by members) for principal and interest, and by relieving members of the obligation to pay past interest.

FOLLOW-UP 2: Again, the question raised was not addressed. What authority was "Retirement Plan Services" acting under? I did not refer to the "County?"

I agree that the County has that authority to act. I also agree that Milwaukee County could adopt an IRS rule rather than create a new pension ordinance. My point is that the County Board never delegated its authority to RPS by establishing a policy to vigorously pursue any overpayment error, which is the point of the proposed ordinance changes at issue. Since RPS does not have the authority to write pension policy (unless the ordinances as amended become law), the IRS rejected its proposal to provide corrective payments to ERS members who were underpaid at a 5% simple interest rate, and instead required an 8% compound interest rate, which remains the required interest rate until the Milwaukee County creates a pension policy regarding the collection of underpayments.

I would encourage you to review County Executive Abele's veto message dated February 16, 2015, which does attempt to answer this question: "I also needed to consider the current policy of the County, what the County Board stated as its intention back in 2007 ("to vigorously pursue recovery")." The ordinance he is referring to is available here for your review.

FOLLOW-UP RESPONSE 2: RPS is a division of HR, which is a department of the County. RPS's Director is a fiduciary and is the head of the sponsor's division that is charged with operating and administering the trust under the supervision and oversight of the Pension Board. The "authority" question is addressed fully above.

The County cannot "adopt" an IRS rule, only the IRS can. The County Board created the Pension Board to oversee and supervise administration, and they do that through RPS. The other points have already been fully addressed above.

QUESTION 3: People in which of the following positions -- the County Executive; members of the Pension Board; attorneys for the Pension Board; actuaries for the Pension Board, County Board Supervisors; the Retirement Plan Services Director; the Comptroller; Director of Performance, Strategy, and Budget; or Corporation Counsel -- can be held personally liable (1) if the Internal Revenue Service (IRS) finds that they knowingly violated, or directed their staff to violate, pension ordinances or ERS rules that caused harm to ERS members or the ERS Trust, or (2) for harm to municipal bondholders if the U.S. Securities and Exchange Commission finds that they knowingly made deceptive public statements to understate or overstate the fiscal or actuarial impact that resolving overpayment or underpayment errors would have on the Milwaukee County budget and ERS pension fund?

ANSWER 3: There is no personal liability absent intentional fraud or intentional wrongdoing. As relevant to these ordinance amendments, there is absolutely no evidence of any fraud or intentional wrongdoing, and no one could prove otherwise. This has been an iterative, cooperative process, involving outside counsel to the Pension Board, the Pension Board, the Office of Corporation Counsel (OCC), outside counsel to the County, the Comptroller, the actuary, the Pension Board itself, the Pension Study Commission, the County Executive, and the County Board. Policymakers and the Pension Board may reasonably and appropriately rely upon the actuarial analyses prepared by the Pension Board's actuary, as well as other expert advice.

A difference of opinion related to policy does not equate to (or even raise any reasonable indicia of) fraud, conspiracy, or malfeasance of any kind.

FOLLOW-UP 3: Is it true that if someone acts both "knowingly" or "intentionally" they could be held personally liable for a violation of a fiduciary duty? I obviously didn't mean to refer to disagreements. A few examples of the conduct I had in mind were - (1) Milwaukee County's actuary at the time, Buck Consulting, intentionally excluding COLA adjustments from actuarial calculations; (2) the Pension Board voting to reduce Buck Consulting's liability to \$1 million just prior to Buck Consulting's COLA error; or (3) RPS Director Coyne's statement at the August 31, 2018 Finance Committee Meeting that these ordinance changes "eliminate the punitive aspects" of the current pension error correction process.

FOLLOW-UP RESPONSE 3: No response required. The question has been answered as fully as appropriate. For a full dissertation on fiduciary duties, please see the American Bar Association's primer, available at:

https://apps.americanbar.org/abastore/products/books/abstracts/5310344_chap1_abs.pdf

QUESTION 4: Would the Schmitt Amendment to the proposed ordinance changes (see here) allow the County Executive to use the \$72.6 million pension contribution appropriated by the County Board in the 2019 adopted budget, or any future pension contribution amount appropriated by the County Board in a future annual adopted budgets regardless of whether the appropriation is made from the General Fund or Pension Obligation Fund, to fund anything other than Milwaukee County's past, present, or future pension obligations?

ANSWER 4: No. And as a technical point, the County Executive has no unilateral budgetary authority, particularly as to the Pension Obligation Bonds.

FOLLOW-UP 4: Could you elaborate on your analysis of the Schmitt Amendment here? I made no reference to Pension Obligation Bonds, I referred to the County's "Pension Obligation Fund," which is referenced twice in the Schmitt Amendment. It's my understanding that ERS and Milwaukee County have separate Pension Obligation Funds, and that the Milwaukee County Board could choose to appropriate money from the County's Pension Obligation Bond for its estimated contribution to the pension fund in its adopted budget, but please correct me if I'm wrong.

FOLLOW-UP RESPONSE 4: No elaboration on the answer is needed as to the first part.

As to the second portion of the follow-up, the Comptroller has confirmed that the County's Pension Stabilization Fund (PSF or what is referred to above as the "Pension Obligation Fund") was established in 2009 with \$6.5 million of tax levy. There is no separate designated/restricted source of moneys for the Employees Retirement System at the county. Section 5 of the Trust Agreement governing the PSF, attached hereto, allows the trust fund to be used for debt related costs plus "to pay annual pension costs, other than normal costs, which shall be based upon a report of the actuary selected by the County Board."

A transfer to ERS of the total overpayment amount owed to ERS (if a member selects Option 1) would be appropriate under the terms of the trust establishing the PSF. However, before any such transfer from the PSF to ERS could be made to reimburse ERS for overpayments (if a member selects Option 1), a fund transfer would need to be approved by the County Board. This ensures Board oversight over this step of the process. The fund transfer would use funds from the PSF to increase the appropriation for pension expenses. A payment would then be made to ERS for overpayments (where a member selected Option 1).

Each year the Pension Board engages an actuary to perform an actuarial analysis of the Employee Retirement System. Using the actuarial report that is delivered to the Pension Board, a letter is issued by the Pension Board of the estimate of the annual pension payment that must be made for the subsequent budget year. Based on the letter, the County Executive includes that pension payment in the annual budget. The County Board approves the annual budget, which ensures oversight over this process, including oversight over the proposed overpayment policy set forth in the amendment package.

If ERS recoups principal payments from members for overpayments under Option 1, RPS would account for and track those payments, and the County would be notified on an annual basis of the total, aggregate principal recoupment amount collected by RPS. The County would reduce its annual pension payment to the Employees Retirement System in an amount equal to that total, aggregate principal recoupment amount.

Either by resolution or fund transfer, the County would move the aggregate principal recoupment amount from the appropriated annual pension payment to the Pension Stabilization Fund. The resolution or fund transfer would require County Board and County Executive approval.

The Pension Stabilization Fund was established in 2008, based upon authority granted to the County under State Statute for the issuance of Pension Obligation Bonds. The County contributed tax levy of \$4.5 million in 2008 and another \$2.0 million in 2009 to the Pension Stabilization Fund. In a recent budget, the County used a portion of the portion of the Pension Stabilization Fund to pay a portion of the pension contribution. At present the Pension Stabilization Fund has a balance of \$5.0 million.

Approximately \$400 million of pension obligation bonds were issued by the County in March 2009. The proceeds of the bond sale were deposited into the ERS trust with the expectation that those moneys would significantly reduce the unfunded liability. The planned pension obligation bond sale was intended to eliminate the unfunded liability that existed as of 12/31/2007 of \$397 million. During 2008, the stock market saw significant losses. These losses occurred prior to the County's issuance of Pension Obligation Bonds. The losses in the stock market and the prior unfunded liability could not be fully covered by the planned pension bond sale. Instead the County continued with its plan of funding the 2007 unfunded liability, with hopes that a stock market rebound would close the gap created by stock market losses. Market assets as of 12/31/2007 were \$1,666 million. Market assets as of 12/31/08 were \$1,595 million, including the proceeds of the pension bond sale. In 2009, the stock market rebounded from losses in 2008, and market assets as of 12/31/2009 were \$1,822 million. The timely sale and investment of Pension Bonds helped provide a benefit to the overall pension fund. The actuarial accrued liability as of 12/31/2009 was \$2,097 million.

Unfunded liability was \$275 million as of 12/31/2009. Unfunded liability is the difference between the actuarial accrued liability and the market value of assets. Actuarial Accrued Liability as of 12/31/09 was \$2,097 million. Market value of assets was \$1,822 million as of 12/31/2009. Therefore, the unfunded liability was \$275 million ($\$2,097 - \$1,822$) as of 12/31/2009.

QUESTION 5: If the Milwaukee County Board wanted to pay all of the unresolved underpayment errors described in the 2014 VCP submission (see here) immediately today, what interest rate would need to be applied to those corrective payments based on current ERS pension policies and IRS directives?

ANSWER 5: There is no current clear, applicable IRS directive or ordinance regarding what interest rate should apply to underpayments most recently reported to the IRS. (The IRS's previous approval only dealt with the underpayments that had previously been identified. As to new underpayments, there is no applicable IRS interest rate directive.)

This is a big reason why the County is considering adopting an interest rate. By doing so, any underpayments which remain to be paid out and corrected – can be corrected and paid out ASAP at a 5% simple interest rate. Doing so now reduces the continued accrual of interest that the County would be responsible for (recall that it took the IRS nearly 7 years to approve the first VCP filing). If IRS later says that the County must pay 8% compounding interest on underpayments, the difference owed will be paid out as soon as possible.

FOLLOW-UP 5: Your answer is very deceptive here. I didn't ask about the most recently filed VCP submissions, and I didn't ask about the 2008 VCP submission. I asked specifically about the underpayments from the 2014 VCP. The 2014 VCP proposed to correct underpayments from 2000-2013 by issuing corrective payments at a 5% interest rate. The IRS issued a contrary directive (as referenced in lines 538-540 of the proposed ordinances) requiring an 8% compound interest rate for those corrective payments. My understanding is that those underpayments from the 2014 VCP supplement are still unresolved and would still require an 8% compound interest rate if paid today, but please correct me if I'm wrong.

FOLLOW-UP RESPONSE 5: The above follow-up description is incorrect. Please see above response. Lines 538-540 and Lines 624-640 are intended to allow for an adjustment to the applicable interest rate if the IRS mandates the use of a rate other than 5% simple with respect to *any* error. Again, please see the above response.

QUESTION 6: If the Milwaukee County Board waits to pay all unresolved underpayment errors described in the 2014 VCP submission (see here) until after the proposed pension ordinance changes (Ordinance File # 18-802) become law and after the IRS approves a future VCP submission that allows for underpayment errors to be resolved at 5% simple interest (so none of the errors are subject to a contrary IRS directive requiring 8% compound interest in conflict with the new Milwaukee County Ordinances section 201.24(8.24)(6)(iv), lines 538-540), would Retirement Plan Services be required to automatically provide an affected ERS member with a corrective payment to resolve those underpayment errors (some dating back to the year 2000), or would the ERS member be expected to proactively seek recoupment by complying with the new proposed ordinance limitations (see Section 201.24(8.24)(2), lines 209-216), including the 6-year claim period, which would result in a corrective payment of \$0 for all underpayment benefit calculation errors made by Milwaukee County's Retirement Plan Services prior to January 7, 2013?

ANSWER 6: The ordinance changes are separate, but related to, the VCP. Whether by adoption of an interest rate now, or a ruling from the IRS in potentially many years, no underpaid member will need to take any affirmative steps to receive their underpayments since RPS will be obligated to proactively pay out those underpaid amounts because, as noted above in numerous places, the County's pension is obligated to pay correct benefits. Again, there would be no action required by a member.

As to the claim period, it is forward looking only and therefore, all underpaid benefits in the past would be paid – this will also be required through the ongoing VCP. Only an underpaid benefit from July 2019 that remains undiscovered until after July of 2025 would even arguably be subject to the claim period. Given the improvements and greater controls, that should not happen. In the meantime, the IRS will likely rule on whether the claim period can apply to underpayments at all.

FOLLOW-UP 6: I agree that the claim period is forward looking only and that an ERS member affected by a past underpayment would not have to request a reimbursement. I cited Section 201.24(8.24)(2) because that section does not adopt the requirements of subsection 6, it only adopts the definition of claim period, ie 6 years. Based on your analysis, it appears that we agree on that point.

My understanding now (thanks to your help!) is that corrective payments for all unresolved underpayments prior to January 1, 2019 could only be limited by the 6 year claim period if Milwaukee County proposes that plan in a new VCP filing and the IRS approves. Please correct me if I'm wrong.

FOLLOW-UP RESPONSE 6: Correct.

QUESTION 7: If the County Board ignores the Pension Board's recommended amendment (see here) to remove language in the proposed pension ordinance changes (see Ordinance File # 16-69) that authorizes Retirement Plan Services to act on behalf of the Pension Board, and the proposed pension ordinance changes (Ordinance File # 18-802) become law, will either Retirement Plan Services or the Pension Board have the power to write binding pension policies without County Board approval or notification of the ERS Plan Sponsor?

ANSWER 7: With respect to the changes to section 201.24(8.21), these amendments were drafted cooperatively in response to the Pension Board's comments by the Pension Board's outside counsel, the Office of Corporation Counsel, and the County's outside counsel. Moreover, the newly amended section reflects the current state of affairs and the legal reality – it does not change current status quo. The legal reality is that RPS administration and operation of the plan is overseen and supervised by the Pension Board. RPS currently creates policies, practices, and processes – and these *must* be in conformity with Pension Board rules and County ordinances and state statutes and IRS regulations, etc. to be legal and enforceable. RPS has no independent authority. The County and Pension Board retain the ability, respectively, to adopt ordinance changes and Pension Board rules, to alter any RPS-adopted policy/process/practice as they wish.

As stated above, RPS must operate in conformity with County ordinances and all Pension Board rules.

Additionally, it is beyond a truism or maxim of (either private or public sector) pension fund management to state that the administrative staff of a pension always needs to further specify operational policies, procedures, and practices to implement the rules and laws governing and establishing the plan.

FOLLOW-UP 7: This answer is deceptive. My question is about the combination of powers granted in the proposed ordinances. You claim that 201.24(8.21) maintains the status quo, which is obviously untrue based on subsection 2 of that section regarding collective bargaining agreements. However, I agree that 201.24(8.21)(1), taken alone, maintains the status quo, but that wasn't my question!

My understanding is that Section 201.24(8.21)(1) along with Section 201.24(8.6) would empower both the Pension Board and Retirement Plan Services to establish rules and regulations, and that if the Pension Board's proposed amendment were adopted, only the Pension Board would be granted that authority.

Your answer describes the current powers of RPS and the Pension Board, but my question specifically asks about their powers should the proposed ordinance amendments be adopted. Since the Pension Board requested the amendment to the pension ordinance changes in its formal comment in December 2018, and is currently prohibited by ordinance from formally commenting on the pension ordinance changes as amended, how did the Pension Board work with the Office of Corporation Counsel cooperatively to address its concerns regarding its proposed amendment

if the original ordinance proposal submitted by County Executive Abele and Supervisor Schmitt was drafted in October 2018?

FOLLOW-UP RESPONSE 7: No further response is required. Nothing in 201.24(8.21) changes either the powers or responsibilities of either RPS or the Pension Board or the County Board. It is a clear, more accurate, description of the current state of affairs. The language to 8.21 was intended to be altered slightly in response to the comments of the Pension Board, in consultation with the Pension Board's outside counsel. That change will be proposed in an amendment at the next Finance Committee. [Please see an additional memorandum, also dated March 8, 2019, submitted by the OCC addressing the changes to 8.21.]

QUESTION 8: Would County Executive Chris Abele be in violation of his fiduciary duty to ERS in any of these scenarios: (1) if he did not disclose all actuarial information utilized in the proposed pension ordinance changes (Ordinance File # 18-802), which caused the Milwaukee County Board to unknowingly violate Milwaukee County Ordinances section 201.24(8.17)(b) (see Ordinance File # 16-69); (2) if he proposed a pension ordinance change for the purpose of both limiting the power of the Pension Board to advise the ERS Plan Sponsor and requiring the Milwaukee County Board to consider misleading information before setting pension policy; or (3) if the Schmitt Amendment (see here) to the proposed pension ordinance changes, which was approved by the Finance Committee on February 1, 2019, was included in the original ordinance jointly proposed by Supervisor Schmitt and County Executive Abele?

ANSWER 8: The County Executive is not a fiduciary of the pension trust, nor is any County Board Supervisor. Collectively, the County is the plan sponsor, with different obligations that are not legally defined as fiduciary duties. Trustees and those that exercise discretion over plan administration and investments are fiduciaries.

An actuarial report is attached to File 18-802.

Nothing in the ordinance package newly limits the power of the Pension Board. The ordinance package has been vetted by the Pension Board, the Office of Corporation Counsel, outside counsel for both the Pension Board and the County, the Comptroller, the Pension Study Commission, at least three times by the Finance Committee, at least once by the Personnel Committee, the Director of RPS, etc. All these parties have operated in good faith and have presented their best professional advice and input to policymakers, the Pension Board, and all stakeholders.

For reference, fiduciary duties are described in a memo submitted to the Pension Board dated March 3, 2017 (and provided in new trustee orientation packets) thusly:

As a fiduciary, a Board Trustee must always act solely in the best interests of all members and beneficiaries, without placing the interests of any one member or group of members above any other; for the exclusive purpose of providing benefits and defraying reasonable expenses in administration of the plan; exercising the care, skill, prudence, caution, and diligence that a prudent person acting in a like capacity and familiar with similar matters would use in the conduct of an enterprise of like character with like aims; by diversifying the investments of the plan, so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and in accordance with the documents and instruments governing the plan.

See 29 USC § 1104(a)(1); Wis. Stats. Chapter 881; Charter § 36-09-1; 2A A. Scott & W. Fatcher, Trusts 170, 311 (4th ed. 1987); G. Bogert & G. Bogert, Law of Trusts and Trustees § 543 (rev.2d ed. 1980).

The duty of loyalty requires Trustees to act without any regard to their own interests or the interests of third-parties and to instead consider only the interests of all Plan participants. The duty of care (also known as the prudent person standard) requires Trustees to act as a prudent person would with similar information in similar circumstances. *See id.*

FOLLOW-UP 8: I apologize for my confusion regarding the County Executive's fiduciary duty. I meant to say he has a fiduciary duty to the ERS Plan Sponsor, but please correct me if that is also incorrect.

The County Board is required to provide the Pension Board with a full disclosure of all actuarial information utilized in the proposed benefit changes pursuant to Milwaukee County Ordinances section 201.24(8.17)(b). Since this ordinance was proposed by the County Executive, I assume any actuarial information he used would also be required to be sent to the Pension Board, so my question is if the County Executive would be violating his duty to the ERS Plan Sponsor by withholding any actuarial analyses he used.

I agree that the powers of the Pension Board are expanded by the proposed ordinance changes. The ordinance proposed by County Executive Abele that limits the power of the Pension Board and forces the ERS Plan Sponsor to consider misleading information is in File # 16-69 (sorry I forgot that citation!).

FOLLOW-UP RESPONSE 8: The County Executive is not a fiduciary to ERS, nor is he, under the law, a fiduciary to the "ERS Plan Sponsor." Likewise, County Supervisors are not fiduciaries to ERS, nor are they, under the law, fiduciaries to the "ERS Plan Sponsor."

ERS is the trust. RPS is the County department. The RPS Director is a fiduciary to ERS because he exercises discretion over the administration of the trust. RPS is charged with the operation and administration of ERS, as overseen and supervised by the Pension Board, who are also fiduciaries. RPS is a division of HR, whose Director is a County Executive appointee, subject to confirmation by the County Board. As stated above, neither the County Executive nor the County Board are fiduciaries.

The actuarial analyses prepared regarding these changes are included in the publicly-available file (which has been available since October 22, 2018). See File 18-802 as already noted above. There are no additional actuarial analyses.

No statement was made as to whether the ordinance package expands the powers of the Pension Board. However, it can be said that nothing in the ordinance package newly limits the power of the Pension Board.

QUESTION 9: If the proposed ordinance changes (Ordinance File # 18-802) become law and administration and implementation of collective bargaining agreements for represented groups is shifted from the Pension Board Secretary to Retirement Plan Services (see lines 168-192); would the Retirement Plan Services Director, or delegated staff, be required to uphold the same fiduciary duty as the Pension Board Secretary currently has?

ANSWER 9: First, section 201.24(8.21) was changed in the package because, based on stakeholder recollections, the Pension Board currently does not have an elected secretary and no secretary performed any duties specifically related to CBAs. (Outside counsel to date has had the responsibility for attending Pension Board meetings and preparing minutes.)

Second and related, as a matter practice, RPS, as overseen by the Pension Board, has a legal obligation to conform its administration of the plan with all applicable laws, regulations – and CBAs as they relate to pension benefits – as explained in numerous places above. This amendment does not act any new changes to pension plan administration – it merely clarifies existing legal and operational reality.

FOLLOW-UP 9: Since when has the Pension Board not had a secretary? I would check myself, but RPS Director Coyne has thus far refused to provide me with access to the Pension Board Minutes I've requested!

Regardless of whether or not the Pension Board has a Secretary currently, and given other Pension Board actions like limiting Buck Consulting's liability it is not a stretch to assume they have not filled that position for the purpose of justifying this move, can you please describe the difference between the fiduciary duty owed by a pension board member and RPS staff?

Retirement Plan Services has been attempting to collect "overpayments" from ERS members based on clerical errors and incredibly minor violations of IRS rules or Milwaukee County Ordinances, many of which could have been resolved by simple ordinance changes with no harm done to ERS members had RPS simply notified the Milwaukee County Board about the issue. Since the collective bargaining agreements at issue are not secret, a reasonable person would assume that RPS already knows exactly what overpayment errors it plans to address if this power is transferred from the Pension Board based on its recent history.

FOLLOW-UP RESPONSE 9:

The Pension Board appointed its outside counsel to act as Secretary in December of 2007.

It is important to also point out that the information sought related to the VCP has been available to the public online via CLIC, specifically including the VCP correspondence dated December 20, 2017, September 14, 2017, and June 22, 201. Please see [File 18-64](#), [File 17-659](#), and [File 17-532](#), respectively, also described below.

18-64: From the Interim Director, Retirement Plan Services, Department of Human Resources, and Director of Risk Management, Department of

Administrative Services, providing an informational report regarding the completed version of the 2014 Supplemental Voluntary Correction Program submission to the Internal Revenue Service. (Considered by the Committees on Personnel, and Finance and Audit) (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)

17-659: From the Interim Director, Retirement Plan Services, Department of Human Resources, and Director of Risk Management, Department of Administrative Services, providing an informational report regarding the status of the 2014 Supplemental Voluntary Correction Plan, and the Baker Tilly Agreed-Upon Procedures Review Audit Phase 2 & 3 Report. (Considered by the Committees on Personnel, and Finance and Audit) (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)

17-532: From the Interim Director, Retirement Plan Services, Department of Human Resources, and Director of Risk Management, Department of Administrative Services, providing an informational report regarding the status of the 2014 supplemental Voluntary Correction Program and the Baker Tilly Agreed Upon Procedures audit review (Phase I). (Considered by the Committees on Finance and Audit, and Personnel) (INFORMATIONAL ONLY UNLESS OTHERWISE DIRECTED BY THE COMMITTEE)

Responses to balance of the open records requests were provided on or around February 18, 2019-March 4, 2019. These responses were provided in a timely manner under Wisconsin Open Records Law, which requires that responses be provided as soon as practical and without delay. Wis. Stat. §19.35(4)(a); *WTMJ, Inc. v. Sullivan*, 204 Wis. 2d 452, 555 N.W.2d 140 (Ct. App. 1996).

Please see the above description regarding fiduciary duties. Also attached please see the Memorandum referenced above. The general description of a fiduciary duty as shared above is no different for the Director of RPS versus a Pension Board trustee. Importantly, it is not the case that necessarily all RPS staff are fiduciaries. An individual RPS staff person would only *arguably* be a fiduciary if she exercised independent discretion. No RPS staff exercise independent discretion.

The ordinance package does not contain any proposed transfer of any power from the Pension Board. There are no changes to any CBA administration related to pensions that are unique to CBAs.

QUESTION 10: If the retirement date for all employees is changed to the first of the month (see lines 60-69 of the proposed pension ordinance changes in Ordinance File # 18-802), but an employee's retirement date would have been any other day of the month under the current rules, would the annual COLA adjustment they are entitled to be less than, equal to, or more than the amount they would receive under the current rules?

ANSWER 10: There is no reasonable evidence or legal principles to support any argument that changing (on a forward-looking basis) the beginning of a retirement date to the 1st of the month for *new retirements* would impact a COLA. An employee can determine when they wish to retire – a month earlier or later, etc. And, the first of the month requirement does not take effect until July 1, 2019, giving people notice to plan their retirement starts, and to consider and potentially utilize all other available paid days off (vacation, sick time, etc.), if they wish to stop working on a mid-month date.

And, requiring retirements to begin on the first of the month is an undisputed best practice. In fact, Baker Tilly and internal analyses identified the variances in retirement start dates as a significant impediment to accurate benefit calculations. All retirees are entitled to counseling sessions to help plan their retirement dates, as has always been the practice.

FOLLOW-UP 10: I am referring to new employees here, and I don't doubt that starting retirement dates at the first of the month is a best practice for other pension systems.

However, the current practice of RPS is to allow retirees to retire on any date. If an ERS member's last day of work is on any day other than the last day of the month, the first pension benefit check that ERS member receives would be one lump sum that covers both the first full month of retirement and a prorated month based on the ERS member's retirement date. For example, if an employee's last day of work is on the 1st of the month, that employee's first pension benefit check will be for an amount that is nearly equivalent to two monthly benefit checks.

Since the COLA for ERS members is calculated based on 2% of the member's first benefit check, new members will obviously receive reduced COLA benefits moving forward.

I don't blame you for missing this since the Comptroller's fiscal analysis offers no detail other than to say there is a fiscal impact, and county's actuary appears to have missed it complete (I, for one, am shocked!), but I know RPS Director Coyne must be aware of that and he told the Pension Study Commission that the only substantive impact of the proposed ordinance change was be to streamline the benefit calculation process. That was not and is not true.

FOLLOW-UP RESPONSE 10: There is no change to COLA calculation under the revised ordinance. The description in the question/follow-up related to how COLAs are calculated is incorrect. If the above description were true, ERS members could “game” the system by simply retiring on the third or fourth of a month, thereby ensuring that their COLA would be calculated based upon their first pension “payment” – which would be nearly two months’ worth of pension

payments. Instead, sensibly, the COLA adjustments are made based upon not the “first payment,” but rather the first full normal month’s pension payment. This ensures fairness to all members. Ordinance 201.24(5.7) states: “Each year after retirement, effective on the first day of the month in which a retired member reaches the anniversary of his retirement date, his monthly pension shall be increased by one and one-half (1½) percent of the amount paid him for *the first full month of his retirement.*”

RECEIVED
MILWAUKEE COUNTY CLERK
2019 MAR 12 P 1:10