

Note: The public minutes from the June 28, 2011, Special Meeting of the Board of Trustees were approved and executed at the September 13, 2011, annual Meeting of the Board of Trustees.

**Special Meeting
Board of Trustees
June 28, 2011**

Public Minutes

**New Hampshire Retirement System
54 Regional Drive
Concord, New Hampshire**

Trustees: Danny O'Brien, *Vice Chair and Presiding*, Sen. Jeb Bradley, Dean Crombie, Justin Cutting, Sam Giarrusso, Rep. Ken Hawkins, Keith Hickey, Kate McGovern, Ph.D., Germano Martins, Brian Morrissey, Cathy Provencher, Jill Rockey. *Absent:* Dr. Lisa Shapiro, *Chair*, Mike Macri.

Fiduciary Counsel: Attorneys Ian Lanoff and Julia Zuckerman of Groom Law Group, via telephone conference call.

Staff: Kim France, *Interim Executive Director*; Jack Dianis, *Director of Finance*; Tim Crutchfield, Esq., *Chief Legal Counsel*; Nancy Miller, *Director of Member Services*; Denise Call, *Director of Employer Services*; Heather Fritzky, *Accounting & Finance Reporting Supervisor*; Marty Karlon, *Public Information Officer*; Cecile Merrill, *Project Manager*; John Browne, *Internal Auditor*; Shannan Hudgins, *Administrative Coordinator*; Deb Kissell, *Administrative Assistant*.

The Vice Chair O'Brien called the meeting to order at 9:02 a.m. Atty. Crutchfield confirmed that the Board had given proper notice of the special public meeting. The Vice Chair then asked for a count of the number of Trustees present, which was twelve. He noted for the public record that fiduciary counsel Atty. Ian Lanoff and Atty. Julia Zuckerman of Groom Law Group were in attendance telephonically.

Vice Chair O'Brien asked Sam Giarrusso, Chair of the Legislative Committee, for a report from the Legislative Committee and to explain the decision to request a special Board meeting. Mr. Giarrusso stated that the Legislative Committee met on June 21, 2011, to review HB 2, noting that fiduciary counsel did not attend that meeting. He reported that it was the Committee's consensus that §188 of HB2 was probably unconstitutional, had requested a response from fiduciary counsel within

five days, and because the bill would become law July 1, 2011, the Legislative Committee felt it was their responsibility to reconvene the Board before its regularly scheduled meeting on July 12, 2011. Trustee Giarrusso read the two motions from the Legislative Committee into the record, as follows:

On a motion by Dr. McGovern, seconded by Trustee Rockey, the Legislative Committee unanimously passed the following: A public statement be made that the Legislative Committee believes that § 188 of HB 2 is probably unconstitutional and recommends that the Board of Trustees convey the same to the Governor and Legislature, and that the draft minutes of this meeting be made public.

Trustee Rockey moved that the Legislative Committee request a Special Meeting of the Board of Trustees to discuss the constitutionality of House Bill 2 as it relates to the New Hampshire Retirement System, and noting it was requesting a response from fiduciary counsel in five days. Dr. McGovern seconded the motion.

Vice Chair O'Brien asked if there were any actions pending before the Board. Trustee Giarrusso made reference to a memorandum from Groom Law Group dated June 27, 2011, marked Privileged and Confidential that each Trustee had been given, and suggested the Board go into executive session to consult with legal counsel.

Vice Chair O'Brien stated he would entertain a motion to temporarily adjourn the meeting to consult with legal counsel under RSA 91-A:2, I(b). Moved by Trustee Martins, seconded by Trustee Giarrusso, the motion carried in a roll call vote, as follows:

Ayes: Trustees Provencher, Morrissey, Cutting, McGovern, Rockey, Giarrusso, Crombie, Martins.

Nays: Sen. Bradley, Rep. Hawkins, Trustee Hickey, and Vice Chair O'Brien.

All Staff and the public attendees were excused from the non-public session. Atty. Lanoff and Atty. Zuckerman remained via conference call.

On a motion by Rep. Hawkins, seconded by Trustee Giarrusso, the Board of Trustees reconvened the Board meeting.

Sen. Bradley moved that the Board of Trustees waive attorney-client privilege and release from confidentiality the Groom Law Group memorandum dated June 27, 2011, from Mr. Lanoff, Ms. Hassell, Mr.

Levine, and Ms. Zuckerman. Seconded by Trustee Hickey, the motion passed as follows:

Ayes: Vice Chair O'Brien, Sen. Bradley, Rep. Ken Hawkins, Trustees Crombie, Cutting, Hickey, McGovern, Martins, Morrissey, Provencher, Rockey.

Nays: Trustee Giarrusso.

Trustee Cutting moved to include a draft of the minutes from the June 14, 2011, along with the June 27, 2011, Groom legal memorandum Board meeting and retain the tape from that meeting so that it was not destroyed. Seconded by Trustee Martins, discussion regarding audio tape maintenance followed. Atty. Crutchfield stated that although there was no legal requirement to keep audio tapes once Board minutes were approved, the Board had made tape retention its practice. In a friendly amendment from Dr. McGovern, Trustee Cutting requested all memoranda from Groom Law Group be gathered into one complete package. Trustee O'Brien called the question, and the motion passed unanimously.

Rep. Hawkins moved to adjourn the meeting which was seconded by Sen. Bradley.

Dr. McGovern moved to instruct New Hampshire Atty. Andy Schulman to file an immediate injunction seeking a review of the constitutionality of HB 2, §188, which was seconded by Trustee Rockey. Dr. McGovern stated that prior to the bill going into effect, she believed it was important to obtain a legal review of its constitutionality. She also stated that she thought the Board had received contradictory opinions from fiduciary counsel and would like a review.

Trustee Provencher asked for an explanation of the term injunction and whether the motion was specific only to §188. Atty. Crutchfield stated his understanding of the term is that, if granted, it stopped the application of that provision. Dr. McGovern stated that such an injunction would be specific only to §188 of HB2. Trustee Provencher stated that she felt she was being asked to make decisions without adequate time to look at and review documents she had received only this morning.

Dr. McGovern stated that the core issue and central problem with §188 of HB2 was the issue of who sets the rates, the NHRS Board or the Legislature. Rep. Hawkins noted and Dr. McGovern concurred that the memo she had just distributed to Trustees left out the excerpt that made it legal, i.e. the Board certified the rates. Rep. Hawkins went on to

explain that Atty. Lanoff had recommended specific language to put into the proposed legislation to make it legal. Rep. Hawkins stated that the language in HB 2 was the same as SB 3 and that detail was left out of Dr. McGovern's memo.

Sen. Bradley stated that Atty. Lanoff was asked this question today, and Atty. Lanoff stated verbally and in his May 15 memorandum that it did not violate the NH Constitution, provided it did not affect the actuarial soundness of the System.

Vice Chair O'Brien noted that a motion had been made and seconded to adjourn. Sen. Bradley and Rep. Hawkins then withdrew the motion on the floor.

An extended discussion followed that focused on the fiduciary responsibility of Trustees to protect the System and to protect the Board's duty to set rates. Atty. Lanoff stated that Groom Law Group had never changed their opinion. When confronted with the first version of the legislation, Atty. Lanoff had consulted with the Interim Executive Director and the Chair about the potential problems with the language, emphasizing that the problems were always referred to as "potential". He stated that Groom Law Group was never asked to write the kind of opinion they have written here. Based on Atty. Lanoff's expressed concerns about a potential problem, the Executive Director communicated with legislators, who then changed the language to eliminate the original problem. Atty. Lanoff continued by stating that the language was restored in the current legislation (HB2). He noted that the language was not exactly the same, but that the outcome was the same. He reiterated that Groom Law Group's position had been that there was a potential constitutional problem over what rates would be certified and what rates employers would be required to pay. Atty. Lanoff stated they were then asked to write a written opinion. Groom Law Group looked back at several cases, e.g. 1991 and the Sudan case before the NH Supreme Court, and based on their research had concluded there was a potential constitutional issue. Atty. Lanoff disputed the statement that Groom Law Group kept changing their opinion, reiterating that their earlier statement was cautionary. They had never said there was a constitutional violation, but had now concluded there might be a constitutional violation. Unless and until the actuary advises the Board there is an actuarial soundness issue would there possibly be a constitutional issue.

In response to Atty. Lanoff's statement that "Groom Law Group was never asked to write the kind of opinion they have written here," Interim Director France stated she would like a correction to the public record that she had sought legal guidance from Atty. Lanoff. As a result of a

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directive she received from the Board Chair, on May 11 she emailed a request to Atty. Lanoff asking him to opine on potential legislation and whether it would usurp the Board's authority. Approximately one week later she resent that request to Atty. Lanoff.

Trustee Provencher asked what would happen if the motion to file an injunction passed. Trustee Rockey responded that Atty. Andy Schulman would be contacted and asked to render a legal opinion on whether §188 of HB2 was constitutional.

Trustee O'Brien called the question on the motion, which passed as follows:

Ayes: Trustees Crombie, Cutting, Giarrusso, McGovern, Martins, Morrissey, Rockey.

Nays: Vice Chair O'Brien, Sen. Bradley, Rep. Ken Hawkins, Trustees Provencher and Hickey.

On a motion by Trustee Giarrusso, seconded by Trustee Rockey, the Board unanimously voted to adjourn 10:15 a.m.

Respectfully submitted,
Shannan Hudgins