

Note: The public minutes from the April 12, 2011 Legislative Committee meeting were approved and executed on April 28, 2011.

**Legislative Committee
of the
Board of Trustees
April 12, 2011**

THE PUBLIC MINUTES

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

Committee Members: Sam Giarrusso, *Chair*; Rep. Ken Hawkins; Kate McGovern; Mike Macri; Jill Rockey.

Trustees: Sen. Jeb Bradley, Dean Crombie, Germano Martins, Keith Hickey, Danny O'Brien, Justin Cutting, Cathy Provencher, *State Treasurer*.

Staff: Kim France, *Interim Executive Director*; Larry Johansen, *Director of Investments*; Jack Dianis, *Director of Finance*; Tim Crutchfield, Esq., *Chief Legal Counsel*; Denise Call, *Director of Employer Services*; Bill Spead, *Regulatory Compliance Officer*; Marty Karlon, *Public Information Officer*; Shannan Hudgins, *Administrative Coordinator*.

Guests: Ian Lanoff, Esq., Kim Dahm, Esq., Groom Law Group, *Fiduciary Counsel*; Nancy Williams, Esq., Hewitt EnnisKnupp; *Governance Consultant*.

Trustee Giarrusso called the Committee Meeting to order at 9:10 a.m., stating that he wished to shift the Agenda and begin with a discussion by NHRS fiduciary counsel. He asked Atty. Ian Lanoff, from Groom Law Group, to address the Committee. Atty. Lanoff had been invited to address not only trustees' fiduciary responsibilities in general, but also those responsibilities specifically related to proposed legislation.

Attorney Lanoff introduced himself and his associate, Kim Dahm, and stated he would divide his remarks between the overall duties of trustees of public pension systems, and the three pending retirement omnibus bills they had been asked to review. He stated that the general fiduciary

duties of NHRS Trustees centered on the duty of loyalty to the System. Firstly, as trustees they were required to comply with statutory standards in reviewing any proposed legislation that the System's consulting actuary had stated would result in a reduction of the funding status of the System. His two examples were: a) any provision that would cut employer contributions below what the consulting actuary advised would protect the actuarial soundness of the System; and b) a provision to raise benefits but not correspondingly give NHRS the authority to raise contributions to cover those increased benefits. Atty. Lanoff stated these were classic examples in which legislation could threaten the actuarial soundness of the System, and therefore, demonstrated the Trustees' clear duty to oppose any such legislation, to work with legislators, and attempt to persuade them not to go forward with such proposals.

Secondly, with regard to any current legislation that proposed to reduce benefits for some or all members of the System, Trustees had a clear duty to review and identify any provisions that counsel advised would violate the Federal Internal Revenue Code (IRC, Code). Atty. Lanoff noted that although federal ERISA statutes were not applicable to public pensions, NHRS fiduciary provisions had been taken directly from the federal statutes and that ERISA law is often used as a best-practice guideline for interpreting the responsibilities of public plan trustees.

Thirdly, Atty. Lanoff stated that in reviewing whether Trustees had a responsibility to object or oppose provisions that would reduce benefits, he opined they did not. He explained that as the sponsor of the plan, the Legislature had the authority to change benefits as long as they were lawful. NHRS Trustees had a duty to follow the law, no matter the individual opinion on proposed benefit reductions. He cautioned that if the Board chose to oppose a reduction in benefits, it risked being sued for opposing reductions in benefits that the consulting actuary might advise would be good for the System. For example, reducing benefits, without reducing employer contributions, would be actuarially good for the System. Atty. Lanoff emphasized that the Board was required to listen to its actuary and legal counsel and to protect the System.

Trustee Rockey asked Atty. Lanoff to discuss the Board's responsibilities in correcting public record, both individually and collectively. He spoke directly to the NH laws and rules that applied to the behavior of individual board members with respect to the legislation, both inside and outside a Trustee meeting. Acknowledging the potential for public misunderstanding and misinterpretation of Trustee commentary, Atty. Lanoff emphasized that while performing NHRS business, fiduciaries were required to act solely in the interest of the System. He cautioned that their constituent "hats" must be acknowledged and removed when

Trustees publicly discuss matters relating to NHRS. He urged each Trustee to act with discretion and an eye to his or her duty of loyalty to the System and to carefully balance constituent responsibilities.

With regard to misinformation, Atty. Lanoff stated that it was standard practice for the Executive Director to correct misinformation. Ms. France asked for clear direction for what information and how much information Staff should be distributing to constituents, which included Legislators who were crafting policy. The Committee Chair deferred the discussion to the full Board and asked Atty. Lanoff to address the three pending legislative bills before the Committee.

Atty. Dahm then spoke to the potential IRC violations in the three pending omnibus bills and identified the following problematic provisions. In HB 2, §166, she identified that the refund of contributions to employers could potentially violate the exclusive benefit clause of the IRC, specifically that the funds of the plan would no longer be used for the exclusive benefit of participants and beneficiaries. She added that such a provision was also a prohibited transaction because funds would be returned to the Settlor. In HB 580, §33, Atty. Dahm identified the waiver of benefits provision, i.e., existing employees opting for more pay over an NHRS benefit, as an impermissible cash-or-deferral election, which government agencies are prohibited from having. She noted that each bill contained a provision that tried to create, or discussed the potential to create, a defined contribution plan, but not enough provision language was included to determine if such a plan met Code requirements. She recommended more attention be focused on any defined contribution plan provisions in all three bills. Atty. Lanoff suggested the Board pursue additional information from its consulting actuary on the effects of a DC plan to the NHRS benefit plan.

Mr. Giarrusso asked if there were IRC issues in SB 3, and Atty. Lanoff answered that vesting issues, which were key provisions in SB 3, had very little legal precedence because the IRS had not focused on public plans. Atty. Dahm stated that the pending legislation vesting details did not currently run afoul of IRC, interpreting the System's definition of vesting found in RSA 100-A:5 and A-10.

Following general discussion to clarify the IRC violations in HB 2 and HB 580, Trustee Giarrusso stated he would entertain a motion to recommend that the full Board of Trustees request a defined contribution plan review from the consulting actuary. Moved by Trustee Rockey, seconded by Trustee McGovern, the motion passed on a 3-1 vote, with Rep. Hawkins voting nay.

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In response to a question from Mr. Spead regarding a proposal under HB 2 that would permit municipal employers to set their own employee contribution rates, Atty. Dahm stated that the benefit formula was not changing and therefore, the provision was not of special concern. Atty. Lanoff stated that although there were compelling arguments against the proposal, they saw no IRC violations. Ms. France stated that the internal legislation tracker would be changed to reflect that HB2 §183 was not an IRC violation provision.

Moved by Trustee Rockey, seconded by Rep. Hawkins, the minutes from the March 17, 2011, Committee meeting were approved. Trustee Giarrusso stated that the next Committee meeting would take place the morning of the May Board meeting, with a provision for another meeting, if necessary.

Trustee Rockey moved to adjourn; seconded by Rep. Hawkins; the meeting adjourned at 10:06 a.m.

Respectfully submitted,
Shannan Hudgins