

OREGON PUBLIC EMPLOYEES RETIREMENT BOARD

Friday February 18, 2005 1:00 P.M.	PERS 11410 SW 68th Parkway Tigard, OR
ITEM	PRESENTER
A. Administration	
1. January 25, 2005 Board Meeting Minutes 2. Director's Report a. Forward Looking Calendar b. OIC Investment Report c. Budget Report d. HB2020 and IAP Update e. Miscellaneous	ALLEN CLEARY CLEARY CLEARY DEFOREST MARECIC / BACON CLEARY
B. Contested Cases	
1. Appeal of Paula Ptacek 2. Appeal of Tracy Vant 3. Withdrawal of Final Order – Thomas C. Steinman 4. Withdrawal of Final Order – Catherine C. Cordell	KUTLER / RODEMAN KUTLER / RODEMAN KUTLER / RODEMAN KUTLER / RODEMAN
C. Action and Discussion Items	
1. 2003 Valuation July 2005 Employer Rates 2. 2004 Preliminary Earnings Crediting 3. Adoption of OAR 459, Division 30, <i>Equal to or Better Than Testing</i> 4. Adoption of OAR 459-010-0003, <i>PERS Membership Eligibility (600 Hours)</i> 5. Adoption of OAR 459-010-0014, <i>Creditable Service</i> 6. Adoption of OAR 459-005-0506 to 0595, <i>Tax Rules</i> 7. Adoption of Temporary Rule and Notice of Rulemaking of OAR 459-070-0001, <i>Definitions</i> 8. Legislative Update 9. Board Governance Matters a. Legal Counsel & Litigation	JOHNSON ORR ROCKLIN / RODEMAN ROCKLIN / RODEMAN ROCKLIN / RODEMAN ROCKLIN / GRIMSLEY RODEMAN KRIPALANI / GRIMSLEY RODEMAN GRIMSLEY / DELANEY PITTMAN ROCKILIN / KRIPALANI
D. Executive Session Pursuant to ORS 192.660 (2) (f) and ORS 40.225	
1. Litigation Update	LEGAL COUNSEL

Note: If you have a disability that requires any special materials, services or assistance, call (503) 603-7575 at least 48 hours before the meeting.

Michael Pittman, Chair * James Dalton * Thomas Grimsley * Eva Kripalani * Brenda Rocklin * Paul R. Cleary, Executive Director

PUBLIC EMPLOYEES RETIREMENT BOARD

PERS Board Meeting

1:00 P.M.
January 25, 2005

Tigard, Oregon

MEETING	1-18-05
DATE	
AGENDA	A.1.
ITEM	1-25-05Minutes

MINUTES

Board Members:

Mike Pittman, Chair
Brenda Rocklin
Thomas Grimsley
Eva Kripalani
James Dalton

Staff:

Paul R. Cleary, Director
Donna Allen
Marsha Bacon
David Crosley
Steve Delaney
Brian DeForest

Gloria English
Stephanie Gillette
Debra Hembree
Nancy Hill
Rick Howitt
Jenny Kumm

Jeff Marcic
Dale Orr
Steve Rodeman
Craig Stroud
Dave Tyler
Brendalee Wilson

Others:

Gordon Allen
Bruce Adams
James Baker
Mike Beasley
Ardis Belknap
Nancy Brewer
Cathy Bloom
Dave Boyer

Tom Chamberlain
Marcia Chapman
BethAnne Darby
Linda Ely
Michelle Deister
Jim Green
Bill Hallmark
DeeAnn Hardt
Debra Guzman

Jerry Donnelly
Mark Johnson
Maria Keltner
Keith Kutler
Michael Maria
Steve Manton
John Meier
Cora Parker
Angie Peterman

Tracy Rutten
Jack Smith
Marjorie Taylor
Deborah Tremblay
Ed Wallace
David Wimmer
Denise Yunker

Board Chair Michael Pittman called the meeting to order at 1:00 P.M. and announced that the Board would be considering agenda items out of sequence due to the substantial interest in Agenda Item D.2. and to accommodate the Board's actuary and legal counsel's schedules. Please note: These minutes are presented in the order of the original agenda sequence.

ADMINISTRATION

A.1. BOARD MEETING MINUTES OF DECEMBER 10, 2004 AND JANUARY 7, 2005

Brenda Rocklin moved and Tom Grimsley seconded to approve the corrected minutes of the December 10, 2004 and January 7, 2005 meetings. The motion passed unanimously.

A.2. DIRECTOR'S REPORT

Director Paul Cleary reported that following the February 18, 2005 Board meeting, the 2004 Preliminary Earnings Crediting report will be presented to the Legislative Ways and Means Committee to allow for the statutorily required 30-day review period prior to Board's final crediting decisions in March.

A.2.a. FORWARD-LOOKING CALENDAR

Cleary briefly reviewed up coming items for Board meetings through April 2005, noting that the date for the March meeting will be set late in the month to accommodate the 2004 Final Earnings Crediting report and related Board decisions.

A.2.b. OIC INVESTMENT REPORT

Cleary presented the Oregon Investment Council's (OIC) retirement fund investment return report for calendar year 2004. Cleary said total yearly earnings for the regular account were 14.47% while yearly earnings for the variable account were in the 13% range.

A.2.c. BUDGET REPORT

Cleary reported the 2003-05 agency administrative budget variance remains at a \$2.1 million surplus. The Director also reported on the ongoing accounting system conversion project to better link PERS with the state's financial management system.

A.2.d. HB2020 and IAP UPDATE

Cleary reviewed the HB2020 Employer Reporting Business Management Plan noting that the plan had been updated with project organization, management, and time-line charts, as well as a detailed communications plan. Cleary also reviewed the performance metrics documenting continued progress on employer reporting, record clearing, and member account postings.

CONTESTED CASES

B.1. APPEAL OF KAREN L. MCCUTCHEON

Steve Rodeman, Policy, Planning and Legislative Analysis Group (PPLAG) manager, reviewed the history of the contested case hearing of Karen L. McCutcheon, spouse of deceased member William McCutcheon.

Staff recommended that the Board adopt the draft final order as presented.

It was moved by Tom Grimsley and seconded by Brenda Rocklin to approve the draft final order as presented by staff. The motion passed unanimously.

CONSENT ACTION AND INFORMATION ITEMS

Rodeman summarized key rulemaking features and the Board took note of the following information items (no action required):

C.1. NOTICE OF RULEMAKING OF OAR 459-010-0035, SIX-MONTH WAITING PERIOD

C.2. FIRST READING OF OAR 459, DIVISION 30, EQUAL TO OR BETTER THAN

C.3. FIRST READING OF OAR 459-010-0014, CREDITABLE SERVICE

C.4. FIRST READING OF OARS 459-005-0506 THROUGH 0595, TAX RULES

ACTION AND DISCUSSION ITEMS

D.1. 2005 MID-YEAR EARNINGS CREDITING

Rodeman provided a summary and background for the Board's 2005 Mid-Year Earning Crediting discussion. The Board had previously directed staff to credit zero earnings to the Tier One Regular Accounts of those members retiring or withdrawing during calendar year 2004 because of the statutory prohibition on crediting such earnings whenever a Tier One Deficit Reserve balance exists. Once calendar year 2004 concluded, it became known that 2004 earnings would be sufficient to zero out the Deficit Reserve effective December 31, 2004. This would allow the Board to begin crediting latest year-to-date earnings to the Regular Accounts of those Tier One members retiring or withdrawing in 2005.

It was moved by James Dalton and seconded by Tom Grimsley to adopt the staff recommendations to (1) signal intent to eliminate the Tier One Deficit Reserve when the 2004 earning crediting is finalized and (2) direct staff to apply an estimated latest year-to-date earnings factor to Tier One Regular Accounts of those members who retire or withdraw in 2005 to be adjusted following the Board's 2004 final earnings crediting decision. The motion passed unanimously.

D.2. 2003 ACTUARIAL VALUATION RESULTS AND JULY 2005 EMPLOYER RATES

Actuarial Analysis Coordinator Dale Orr reviewed the staff research of other large public pension system valuations and the employer rate adjustment processes. Orr said many other systems are facing identical challenges absorbing the significant 2000-2002 investment losses and are considering phasing-in the associated employer rate increases.

Actuary Mark Johnson gave a PowerPoint presentation titled *Oregon PERS Preliminary Employer Results of the 2003 Actuarial Valuation*. Johnson said the primary reason for the substantial increase in the employer contribution rates is the 2000-2002 stock market losses. Johnson said that the creation of Tier 2 in 1996 and the more recent PERS reform legislation help keep employer rates significantly lower than they would otherwise be without those measures. Johnson said there were multiple options for the Board to choose from in implementing new employer rates and advised the Board to make decisions based on what would be best for Oregon's situation. Johnson said that a phase-in of the employer rate increase would be financially prudent and consistent with the Board's fiduciary obligations.

Pittman said that pending court decisions on the PERS reform legislation and future fund earning assumptions must be considered in the Board's decision. Pittman invited testimony from the various stakeholder representatives in the audience, with Jim Green, Oregon School Board Association; Nancy Brewer, Financial Coordinator for the City of Corvallis; Maria Keltner,

Association of Oregon Counties; and BethAnne Darby, Oregon Education Association, providing comments and perspective on the various options.

Cleary reviewed the various rate phase-in options and said it is important to select an approach that is actuarially, financially, and administratively sound.

The Board discussed the need to maintain the sound financial footing of the system; the impact that the projected rate increases could have on employers at various stages of budget adoption; the pros and cons of the rate phase-in options; the continued availability of lump-sum payment and pension obligation bond options for all employers; and the viability of offering non-pooled employers the option of paying the increase in one-step.

It was moved by Eva Kripalani and seconded by Brenda Rocklin to adopt a two-biennium rate phase-in schedule while giving non-pooled employers the option to pay the increase in one-step as opposed to paying under the two-step method. The motion passed unanimously.

D.3. ADOPTION OF OAR 459, DIVISIONS 05, 70, AND 80, OPSRP MISCELLANEOUS

- a. OAR 459-005-0310, 0350, and 0370, *Division 5 Rules Related to Optional and Alternative Retirement Plans*
- b. OAR 459-005-0591, *Definitions – Direct Rollovers*
- c. OAR 459-070-0050, *Participation of Public Employers*
- d. OAR 459-080-0050, *IAP Employer Account Contributions*

Rodemán summarized the key rule features, the public comments received, and the staff responses thereto, including the related rule modifications.

It was moved by Tom Grimsley and seconded by Brenda Rocklin to adopt the permanent rule modifications to OAR 459, Divisions 05, 70, and 80, as presented, to be effective upon filing. The motion passed unanimously.

D.4. LEGISLATIVE UPDATE

Deputy Director Steve Delaney presented the most recently filed legislative bills. Delaney said that the Break-In-Service bills (SB 105 and SB 188) would be the most significant of the PERS-related bills that have been introduced so far in the legislative session. Delaney also reviewed the necessity for tracking lobbying activities and expenditures for staff and Board members.

Keith Kutler, Department of Justice, provided general guidelines and an overview of the state lobbying regulations. Kutler said the Deputy Attorney General has observed that if an agency over-reports lobbying, the risk is a political one by giving the appearance of spending too much time trying to legislate; if the agency under-reports, there may be a risk of violating statutes that require reporting of lobbying. Kutler said agencies should consider all situations and seek advice where there may be a question whether a meeting or conversation would qualify as lobbying.

PERS Board meeting

January 25, 2005

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D.5. BOARD GOVERNANCE MATTERS

There were no Board governance matters.

EXECUTIVE SESSION

E.1. LITIGATION UPDATE

Pursuant to ORS 192.660 (2) (f) and ORS 40.255, the Board went into executive session.

The Board reconvened to open session.

Mike Pittman adjourned the meeting at 4:25 P.M.

Respectfully submitted,

Paul R. Cleary
Executive Director

*Prepared by Donna R. Allen, Executive Assistant
All meetings are recorded and the recordings are available to the public.*

MEETING	
DATE	02-18-05
AGENDA	A.2.a.
ITEM	Forward Looking Calendar

PERS Board Meeting Forward-Looking Calendar

March 2005

Meeting: 1:00 P.M. March 29, 2005

- Appeal of Billy R. Hunter
- Appeal of Jon Phillips
- 2004 Final Earnings Crediting
- Adoption of OAR 459-010-0035, *Six-Month Waiting Period*
- Adoption of *Division 15 Disability Rules*
- Adoption of *Division 76 Disability Rules*
- Notice of Rulemaking of *Employer Payments through Automated Clearing House*

April 2005

Meeting: 1:00 P.M. April 15, 2005

- First Reading of *Employer Payments through Automated Clearing House*

May 2005

Meeting: 1:00 P.M. May 20, 2005



Oregon

Theodore R. Kulongoski, Governor

Public Employees Retirement System

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11410 S.W. 68th Parkway, Tigard, OR

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MEETING	2-18-05
DATE	
AGENDA	A.2.c.
ITEM	Budget Update

February 8, 2005

MEMORANDUM

TO: Members of the PERS Board

FROM: Brian DeForest, Budget and Fiscal Operations Manager

SUBJECT: February, 2005 Budget Report

ACTUAL EXPENDITURES VS. PROJECTIONS

The projected budget surplus for the Administrative appropriation is now \$0.2 million with accounting data for the month of December and re-forecasting remaining expenditures. As noted in the last budget report, projected costs of \$2.1 million for the first phase of the RIMS Conversion Project have now been included in this budget report. Total actual expenditures for the Administrative appropriation were \$1,720,295, a decrease of \$138,752 below November expenditures. Actual expenditures for the month were \$546,581 below projections.

ISSUES/OPPORTUNITIES

Cost allocation continues to shift personal services expenditures from the Administrative appropriation to the AEF and HB2020 appropriations contributing nearly \$100,000 to the surplus increase noted above. I anticipate that shift to soften in the next quarter as managers re-forecast work assignments for the first quarter of 2005.

Vendor payments for the R*STARS project and first stage of the RIMS Conversion project are anticipated to begin in the first quarter of the 2005. As such, projected costs for professional services increase significantly over the next few months. However, the bulk of vendor payments will likely be made at the end of the biennium in the month of June, creating the end of biennium "hockey stick." Additional smaller projects, such as purchase and installation of technology asset management tools, are also anticipated in the final 6 months of the biennium.

BUDGET VARIANCES

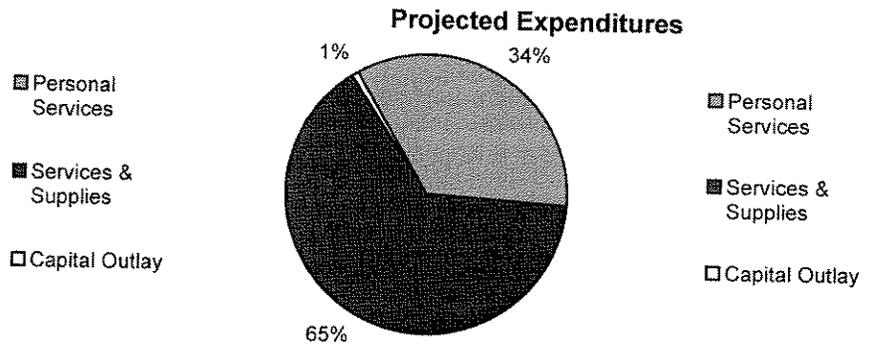
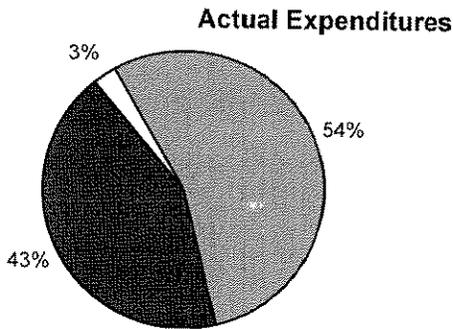
Budget variances remained relatively stable compared to the previous report. A variance of note that was not previously reported is the Telecommunications Equipment account in the Capital Outlay expenditure category of \$265,280. The agency was approved for a total budget limitation of nearly \$750,000 Other Funds to replace existing telephone equipment, software and related services. However, that project will come in substantially under budget, thus creating the noted positive variance.

**2003-05 Admin Budget Execution
Summary Budget Analysis
For the Month of: Dec. 2004**

MEETING DATE	2-18-05
AGENDA ITEM	A.2.c. Budget Update Attachment

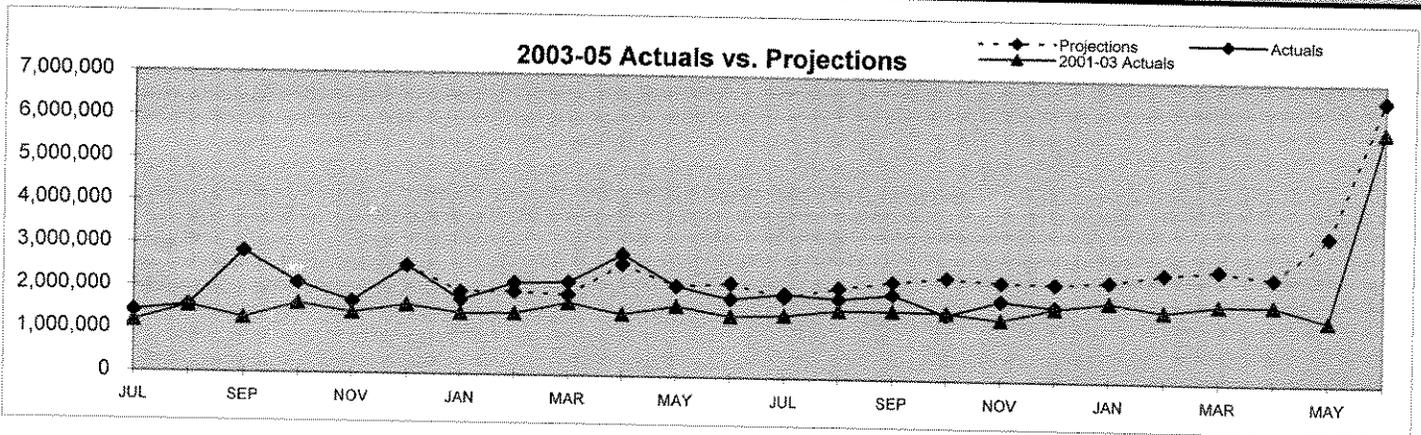
Biennial Summary

Category	Actual Exp. To Date	Projected Expenditures	Total Est. Expend.	2003-05 LAB	Variance
Personal Services	18,554,576	7,494,089	26,048,665	32,782,666	6,734,001
Services & Supplies	14,583,865	14,067,269	28,651,134	22,242,381	(6,408,753)
Capital Outlay	919,592	190,691	1,110,282	968,686	(141,596)
Special Payments					
Total	34,058,033	21,752,049	55,810,082	55,993,733	183,651



Monthly Summary

Category	Actual Exp.	Projections	Variance	Avg. Monthly Actual Exp.	Avg. Projected Expenditures
Personal Services	925,511	1,024,488	98,977	1,030,810	1,249,015
Services & Supplies	794,784	1,242,388	447,604	810,215	2,344,545
Capital Outlay				51,088	31,782
Special Payments					
Total	1,720,295	2,266,876	546,581	1,892,113	3,625,341



2001-03 Biennium Summary

Category	Actual Exp. To Date	Projected Expenditures	Total Est. Expend.	2001-03 LAB	Variance
Personal Services					
Services & Supplies					
Capital Outlay					
Special Payments					
Total					



Oregon

Theodore R. Kulongoski, Governor

February 11, 2005

Public Employees Retirement System

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Tigard, OR 97281-3700
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MEETING	2-18-05
DATE	
AGENDA	A.2.d.
ITEM	HB202 Update

TO: Members of the PERS Board

FROM: Jeff Marecic, Information Service Division Administrator
Marsha Bacon, Customer Service Division Administrator

SUBJECT: Update of HB2020 Employer Reporting Business Management Plan

Attached to this memorandum is an updated version of the Attachment D, Employer Reporting Statistics, accompanying the HB2020 Employer Reporting Business Management Plan. As noted in the January 25, 2005 Board memorandum, the stated workplan moved additional reports to the posting category. As an update to that workplan, staff held employer workshops in the Portland metro area, mid-Willamette Valley and central and eastern Oregon to assist employers in clearing the reports and records.

Current Status

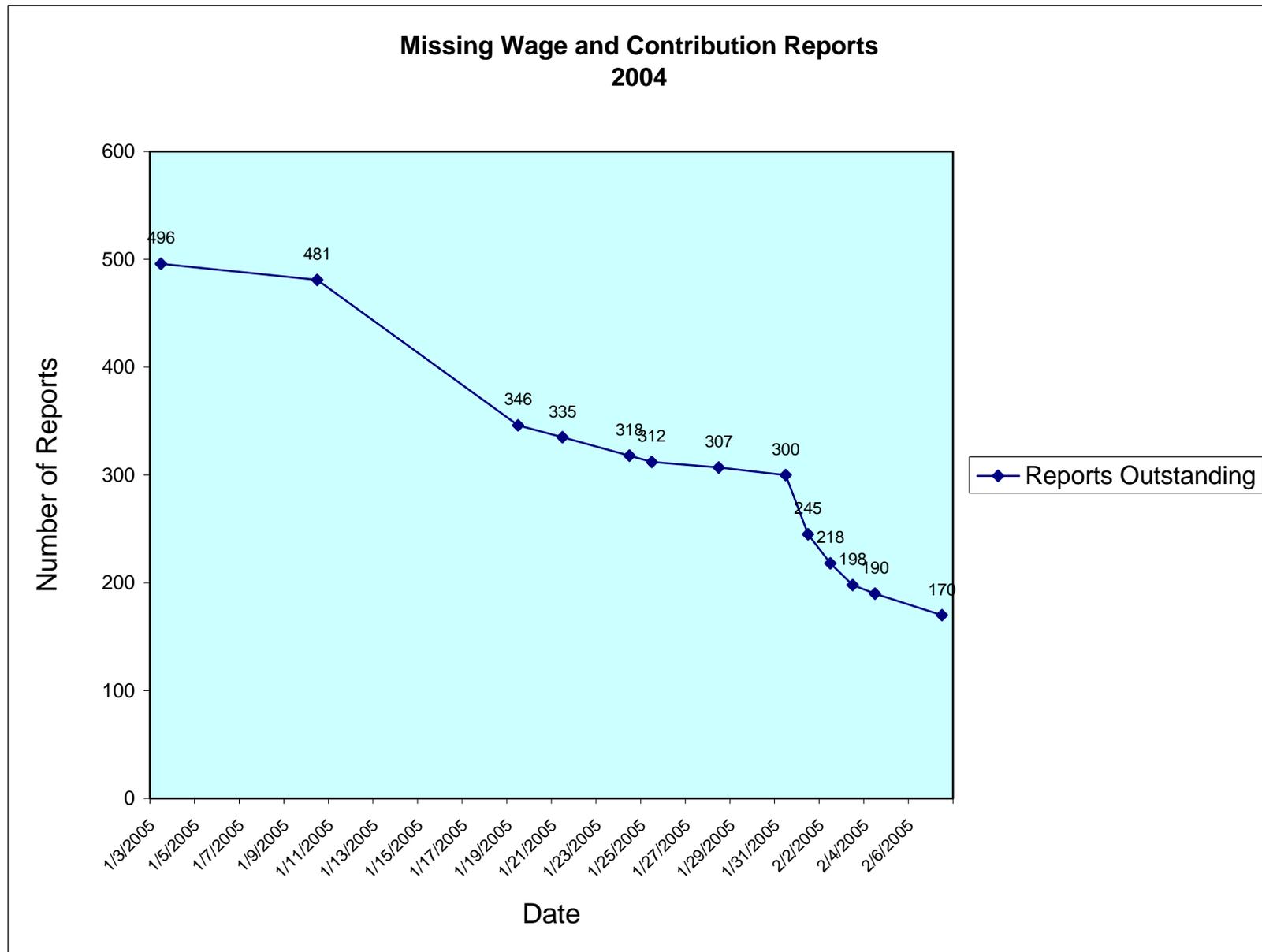
Based on the latest information from the Employer Production Report as of February 7, 2005:

- Number of reports due for 2004 12,677
- Number of reports not posted for 2004 170
- Number of reports fully posted at 100% 10,662
- Number of member records received for 2004 2,926,383
- Number of member records not posted for 2004 38,603
- Amount of member contributions not posted for 2004 \$2,110,347
- Amount of member contributions posted for 2004 \$406,812,620

Appendix D

Employer Reporting Statistics

Last Updated: February 7, 2005

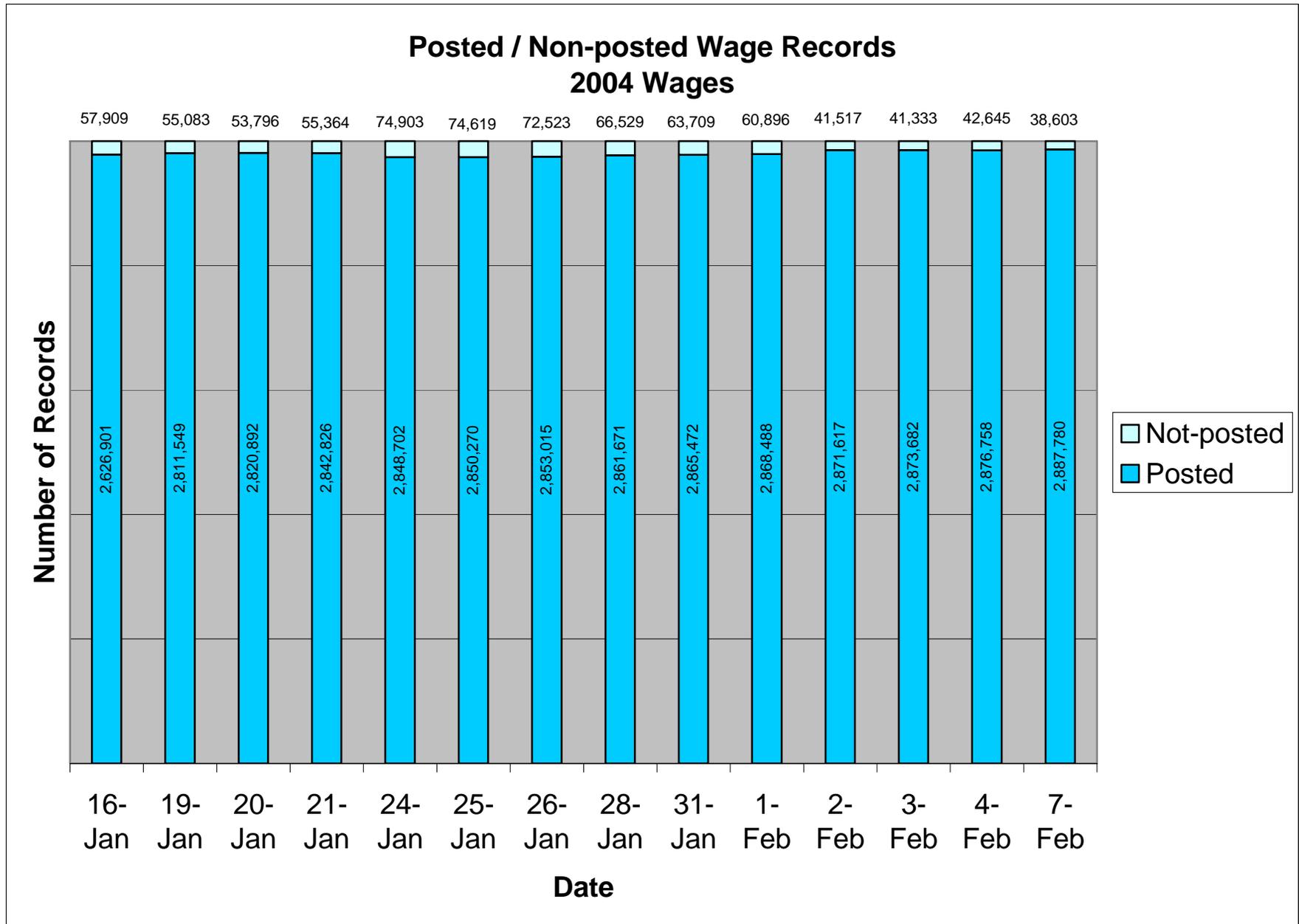


'Top 20' Employers with Highest Number of Reports / Estimated Records Outstanding

ID	Name	Employees	Rpt Freq	# Rpts Due	# Rpts Outstanding	Nbr Unposted W&C Records	Estimated Number of Outstanding W&C Records
2042	JOSEPHINE COUNTY	831	MNLY	12	2	95	1,662
2908	CLACKAMAS COMMUNITY COLLEGE	1366	MNLY	12	1	250	1,366
2118	ONTARIO, CITY OF	193	MNLY	12	5	217	965
3865	POLK CNTY SCH DIST #21	77	SMON	24	12	22	924
2633	CASCADE LOCKS, PORT OF	70	SMON	24	5	-	350
4335	UMATILLA CNTY SCH DIST 7	311	MNLY	12	1	120	311
3957	UMATILLA CNTY ADMIN SCH DIST #1R	36	MNLY	12	5	-	180
2021	BAKER COUNTY	157	SMON	24	1	342	157
3116	CLACKAMAS CNTY SCH DIST #53	149	MNLY	12	1	167	149
2280	WINSTON, CITY OF	20	SMON	24	6	-	120
2160	HERMISTON, CITY OF	90	SMON	24	1	27	90
2569	CENTRAL OREGON INTERGOVRNMNTL O	75	MNLY	12	1	-	75
2290	MOLALLA, CITY OF	55	SMON	24	1	33	55
3320	DOUGLAS CNTY SCH DIST #21	53	MNLY	12	1	6	53
2791	CLACKAMAS COUNTY FAIR	26	SMON	24	2	23	52
2044	CROOK COUNTY	25	MNLY	12	2	2	50
4383	CITY VIEW CHARTER SCHOOL	5	MNLY	11	10	1	50
4377	MORRISON CHARTER SCHOOL	7	MNLY	12	7	17	49
2821	TILLAMOOK CNTY SOIL AND WATER CON	6	MNLY	12	6	2	36
2511	GRANTS PASS IRRIGATION DISTRICT	17	SMON	24	2	2	34

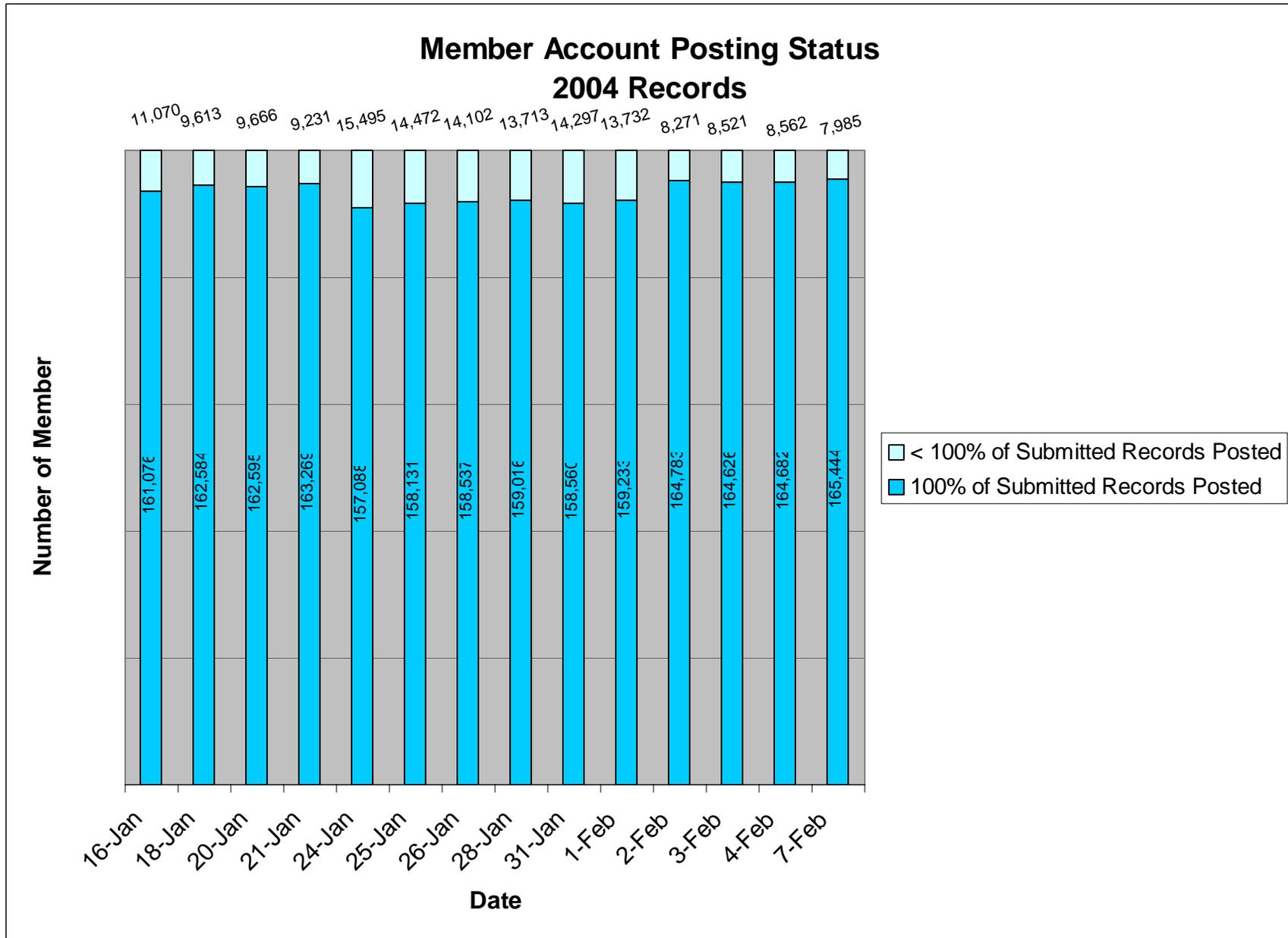
Note:

Employers are ranked by the Estimated Number of Outstanding W&C Records. This is derived by multiplying the number of Employees by the number of Reports Outstanding.

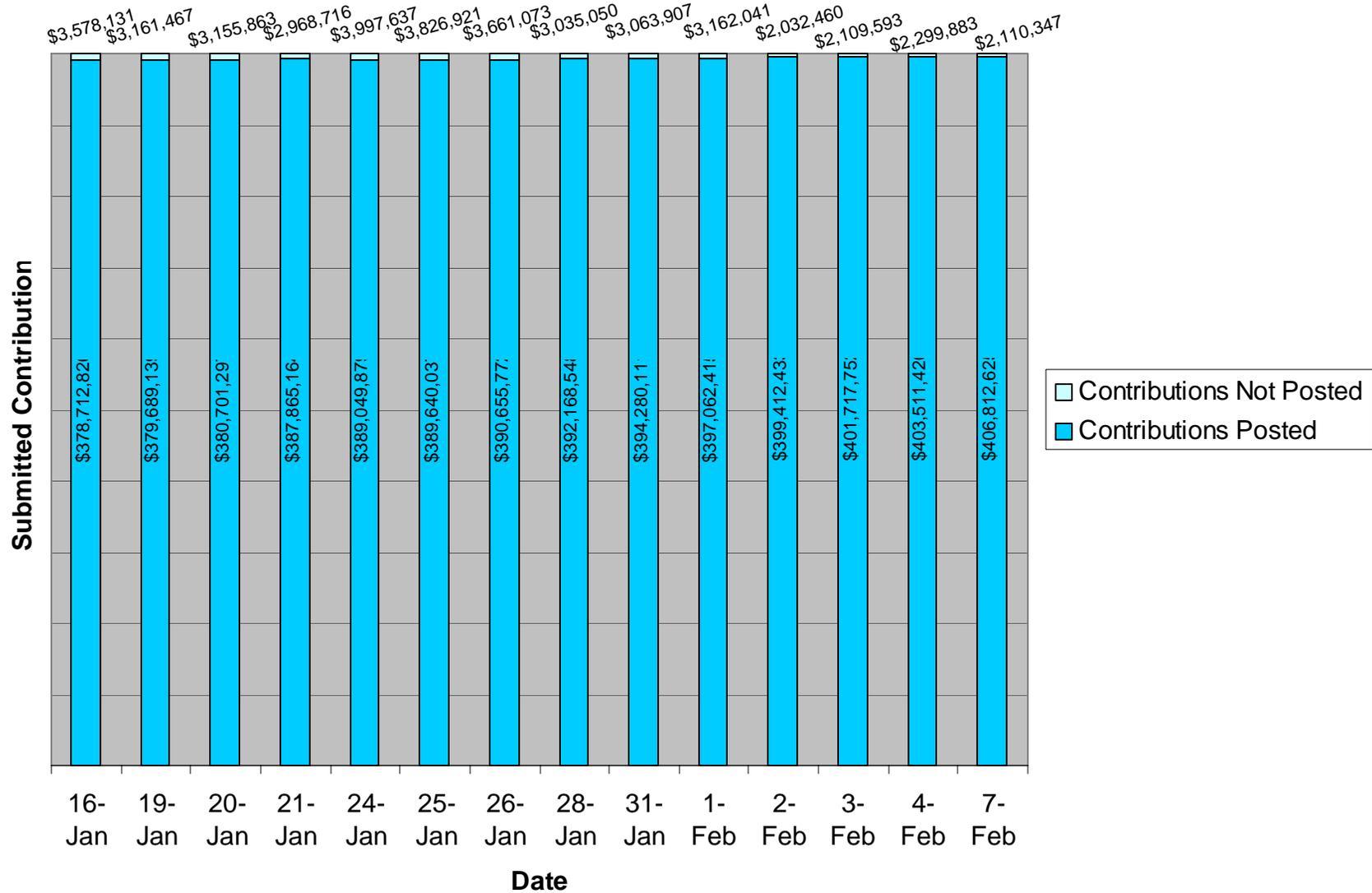


'Top 20' Employers with Highest Number of Unposted Records

ID	Name	Employees	Rpt Freq	# Rpts Due	# Rpts Outstanding	Nbr Unposted W&C Records	Estimated Number of Outstanding W&C Records
3735	MARION CNTY SCH DIST #24J	5674	MNLY	12	0	4,467	-
3818	MULTNOMAH CNTY SCH DIST #1	6312	MNLY	12	0	3,827	-
1252	OREGON STATE UNIVERSITY - OUS	5241	MNLY	12	0	1,942	-
2880	OR HEALTH AND SCIENCES UNIVERSITY	6186	BIWK	26	0	1,680	-
4341	HILLSBORO SCHOOL DISTRICT #1J	2873	MNLY	12	0	1,379	-
3241	COOS CNTY SCH DIST #8	176	MNLY	12	0	1,372	-
3456	KLAMATH CNTY SCH DIST CU	966	MNLY	11	0	1,274	-
1253	PORTLAND STATE UNIVERSITY - OUS	3216	MNLY	12	0	1,202	-
2008	LANE COUNTY	2047	BIWK	26	0	1,026	-
1050	DEPARTMENT OF CORRECTIONS	3875	MNLY	12	0	897	-
1254	UNIVERSITY OF OREGON - OUS	5049	MNLY	12	0	868	-
1246	HUMAN SERVICES, DEPARTMENT OF	9369	MNLY	12	0	858	-
4268	CLACKAMAS CNTY SCH DIST #7J	1304	MNLY	12	0	672	-
3039	BENTON CNTY SCH DIST #509J	1277	MNLY	11	0	608	-
3510	LANE CNTY SCH DIST #52	1150	MNLY	12	0	443	-
4062	BEAVERTON SCH DIST #48J	5426	MNLY	12	0	420	-
3454	JOSEPHINE CNTY SCH DIST #7	917	MNLY	12	0	418	-
1210	STATE PARKS & RECREATION DEPARTM	517	MNLY	12	0	412	-
4316	WASHINGTON CNTY SCH DIST #23J	1891	MNLY	12	0	345	-
2021	BAKER COUNTY	157	SMON	24	1	342	157



Member Contribution Posting Status 2004 Contributions





Oregon

Theodore R. Kulongoski, Governor

MEETING	2-18-05
DATE	
AGENDA	C.1.
ITEM	2003 Valuation Employer Rates

(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

February 8, 2005

TO: Members of the PERS Board

FROM: Dale S. Orr, Actuarial Analysis Coordinator

SUBJECT: 2003 Valuation – July 2005 Employer Rates

On February 18, 2005, Mark Johnson of Milliman Consultants and Actuaries will present the individual employer contribution rates based on the 2003 Valuation. These rates will be effective July 1, 2005.

Because of the substantial 2000 – 2002 fund investment losses, most employers will be facing a significant increase in contributions. As such the Board, at its January 25 meeting, adopted a two-step phase-in of the rate change over the next two bienniums. The rates provided by the actuary will reflect these decisions. The Board also decided to give non-pooled employers the option of paying the increased rates in one-step.

Following the actuary's presentation of the rates to the Board, staff will work with the actuary to provide notification of the new rates to the employers. This process should be completed by March.

As soon as the actuary's contribution rate calculations are finished, they will be made available to the Board.

If you have any questions, please call me at (503) 603-7704.



Oregon

Theodore R. Kulongoski, Governor

February 11, 2005

MEETING	2-18-05
DATE	
AGENDA	C.2.
ITEM	2004 Preliminary Earnings Crediting

Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board

FROM: Dale S. Orr, Actuarial Analysis Coordinator

SUBJECT: 2004 Preliminary Earnings Crediting

EXECUTIVE SUMMARY

Staff is requesting that the Board make a preliminary 2004 earnings-crediting decision and authorize that a report, reflecting that decision, be submitted to the Joint Ways and Means Committee of the Oregon State Legislature. This action is needed in order to comply with ORS 238.670(5), which requires the PERS Board to provide a preliminary proposal to a legislative committee 30 days prior to the crediting of any interest or other income.

At its meeting on February 18, the Board will be asked to take preliminary action on the following crediting issues:

1. Funding of Contingency Reserves;
2. Crediting of earnings to liquidate the Tier One Deficit Reserve through the transfer of Tier One member Regular Account earnings;
3. Crediting of Tier One member Regular Accounts;
4. Funding of the Capital Preservation Reserve;
5. Crediting of Tier Two member Regular Accounts; and
6. Crediting of Benefits-In-Force and Employer reserves.

Preliminary 2004 earnings information is being developed by Fiscal Services and will be made available at the Board meeting. Upon the Board's approval of preliminary 2004 earnings crediting, staff will prepare and present the required report to the Legislative Ways and Means Committee. Any comments received from the legislative committee will be presented to the Board prior to its final earnings crediting decision in March.

The making of this preliminary decision and the resulting report to the Legislature does not prohibit the PERS Board from changing its policy or the final crediting decision in March if new information becomes available or policy changes occur. If a significant difference occurs between the actual and preliminary crediting, staff will promptly report the Board's actions to the Legislature.

Background:

- a. *Administrative Rule (OAR 459-007-0005)*. This rule provides the agency's policy and summarizes the statutory construction that is the basis for the annual crediting of earnings. Among other things, this rule directs an equal percentage distribution of earnings between the Benefits-In-Force, and Employer Contribution Account Reserves.
- b. *Contingency Reserve (Current Balance: \$787.90 million)*. Statute requires the Board to fund the Contingency Reserve (ORS 238.670(1)) when earnings are above the assumed earnings rate, in an amount that the Board deems advisable, not to exceed 7.5% of earnings in any single year. Statute also requires the Board to continue to credit the reserve until it is adequately funded for the following purposes:

To prevent any deficit of moneys for the payment of retirement allowances due to:

- a. interest fluctuations;
- b. changes in mortality rate; or
- c. other contingencies.

To prevent any deficit in the fund:

- a. by reason of employer insolvency (to be funded from Employer Reserve earnings only);
- b. to pay certain legal expenses or judgments; or
- c. for any other contingency the board may determine appropriate.

The Contingency Reserve does not receive its own earnings. Funds are added to or deducted from the Reserve only by Board action.

- c. *Tier One Deficit Reserve (Current Balance: negative \$255.60 million)*. The Deficit Reserve was created to allow the crediting of the assumed earnings rate to Tier One member Regular Accounts during the poor earning years of 2001 and 2002. ORS 238.255 requires that earnings that would be otherwise credited to Tier One member Regular Accounts be first applied to the Deficit Reserve until it is eliminated.

When the Board credited 2003 earnings, it redirected earnings that would have otherwise been credited to the Benefits-In-Force Reserve to the Deficit Reserve in the amount by which Tier One members who retired in 2002 and 2003 benefited from the Deficit Reserve prior to retirement. The reasoning for this decision was recognition that when members retire, their reserves are transferred to the Benefits-In-Force Reserve and are no longer part of the Tier One Regular Account balance. To ensure that the same reserves that helped contribute to the Deficit Reserve balance also participate in its reduction, the Board directed a portion of the Benefits-In-Force earnings be credited to the Deficit Reserve. Staff advised the Board that they would be continuing this practice in subsequent years until the Deficit Reserve is eliminated.

- d. *Rate Preservation Reserve (Current Balance: \$0.0)* The purpose of this reserve, as set out in ORS 238.255, is to provide Tier One member Regular Accounts with a full credit of the assumed earnings rate (currently 8%) in those years in which available earnings are insufficient to reach that level. The reserve is to be funded with all excess Tier One earnings after Tier One member Regular Accounts have been credited at the assumed rate. The reserve is to be funded at a level, set by the Board after consultation with the actuary, necessary to ensure a zero balance in the account when all Tier One members have retired. The Rate Preservation Reserve is to be fully funded, at the Board's goal, for three consecutive years before earnings in excess of the assumed earnings rate can be credited to Tier One member Regular Accounts. Because the reserve currently has a zero balance, the Board will not have any crediting discretion over the Rate Preservation Reserve this year.
- e. *Capital Preservation Reserve (Current Balance: \$432.9 million)* The purpose of this reserve is to "offset gains and losses in invested capital" (ORS 238.670(3)). In other words, this reserve can be used to keep reserve balances from declining in those years in which investment earnings are negative. The funding of this reserve is wholly at the Board's discretion. Earnings used to fund the Capital Preservation Reserve come from earnings that would otherwise be credited to Tier Two Member Regular Accounts, Employer Contribution Accounts and the Benefits-In-Force Reserve.

When the Board credited 2003 earnings, it chose to place 7.5% of available earnings in the Capital Preservation Reserve. This funding level was chosen as it reflected the same funding level designated in statute for the Contingency Reserve. In the absence of any other directive, the Board decided that this funding level was sufficiently conservative to serve the Board's purposes until a funding goal can be determined.

The PERS Board has not adopted overall funding goals for its reserves. As such, the annual actions taken by the Board set the funding levels of the reserves. To assist the Board in its decisions, the attached document entitled "2004 Reserving Facts and Issues" has been provided.

Again, the preliminary 2004 earnings crediting numbers will be provided to the Board as soon as they are made available.

Attachment: "2004 Reserving Facts and Issues"

Public Employees Retirement System 2004 Reserving Facts and Issues

ISSUE

Since 2004 Regular Account earnings will exceed the assumed earnings rate, the PERS Board must determine what amount, if any, it should place into the Contingency Reserve. The Board may also make contributions to the Capital Preservation Reserve at any time that available earnings exceed zero.

RESERVE CREDITING SUMMARY

Contingency Reserve Crediting Requirements: In those years in which earnings exceed the assumed earnings rate (currently 8%), ORS 238.670 (1) requires the Board to “set aside, out of interest and other income...such part...as the Board may deem advisable, not exceeding seven and one-half percent of the combined total of such income...until the board determines that the reserve account is adequately funded...” This set-aside constitutes the Contingency Reserve. The Contingency Reserve can be used to prevent any deficit of moneys for the payment of retirement allowances due to:

1. interest fluctuations;
2. changes in mortality rate; or
3. other contingencies.

The Contingency Reserve may also be used to prevent any deficit in the fund:

1. by reason of employer insolvency (to be funded from Employer Reserve earnings only);
2. to pay certain legal expenses or judgments; or
3. for any other contingency the board may determine appropriate.

Capital Preservation Reserve Crediting Requirements: The crediting of earnings to the Capital Preservation Reserve is discretionary (on the part of the Board) and comes from earnings that would otherwise go to Tier Two member Regular Accounts, Employer Reserves and the Benefits In Force Reserve. The reserve is to be used to cover the gains and losses of invested capital. The statutory guidance for the Capital Preservation Reserve is ORS 238.670 (3).

Rate Preservation Reserve Requirements: All available Tier One member Regular Account earnings, above the amount needed to eliminate the Tier One Deficit Reserve and credit Tier One member Regular Accounts the assumed earnings rate, are to be placed in the Rate Preservation Reserve. The Rate Preservation Reserve is to be funded, at a level determine by the Board, for three consecutive years before the reserve is considered fully funded. This reserve is to be used to credit the assumed earnings rate to Tier One member Regular Accounts in those years in which earnings are insufficient. Because the reserve has not been funded for three consecutive years, as required by (ORS 238.255), the Board does not have any crediting discretion over the Rate Preservation Reserve for 2004 earnings.

POINTS OF FACT

- PERS Board has not established an overall reserving policy or funding goals for the Contingency Reserve, Capital Preservation Reserve or the Rate Preservation Reserve.
- The Contingency Reserve balance is currently \$787.9 million, the Capital Preservation Reserve totals \$432.9 million, and the Rate Preservation Reserve has a zero balance.
- The Supreme Court is expected to rule on PERS reform legislation during 2005. Reversal of parts or all of the legislation could have significant financial impact.
 - The 2003 PERS Legislation resulted in a projected reduction of approximately \$9 billion in plan liabilities. A significant part of this liability could return depending on the Court's decision.
 - The Contingency Reserve can be used to mitigate the financial impact of the Court ruling.
 - The Capital Preservation Reserve cannot be used to directly offset liability increases resulting from an adverse ruling on reform legislation, but it can be used to mitigate the impact of such an event by offsetting past, current and future investment losses.
 - The Rate Preservation Reserve cannot be used for any purpose other than to assist in the crediting of the assumed earnings rate to Tier One member Regular Accounts.
- 2005-2007 employer rates, projected to average 18.89% of payroll (before side accounts), are at historic highs due to the substantial fund investment losses of 2000 to 2002 and are not expected to decline significantly in the near term.
- Neither the Contingency Reserve or the Capital Preservation Reserve is included in the actuarial value of assets. As such, earnings set-aside in these reserves cannot be considered when calculating the system's employer rates.
- Earnings set-aside in the Contingency Reserve will not be credited to Tier One and Tier Two member Regular Accounts, therefore reducing the growth in pension benefits (for Money Match pensions). In addition, earnings set-aside in the Contingency Reserve, to a greater extent, will reduce the growth in total assets used to fund pension liabilities when calculating employer rates.
- Earnings set-aside in the Capital Preservation Reserve will not be credited to Tier Two member Regular Accounts, therefore reducing the growth in pension benefits (for Money Match pensions). In addition, earnings set-aside in the Capital Preservation Reserve, to a greater extent, will reduce the growth in total assets in the Benefits-In-Force and Employer Reserves that would otherwise be available to fund pension liabilities when calculating employer rates.

PRIMARY ISSUES

The Board is faced with three primary issues that must be considered in relation to whether or not, or by how much to fund the Contingency or the Capital Preservation Reserves with 2004 earnings (again, the Rate Preservation Reserve crediting is statutorily driven):

1. Compliance with Statutory Crediting Requirements

Statute requires that the Board determine how much to fund the Contingency Reserve when earnings exceed the assumed earnings rate. Because the Board has not set a goal or developed a reserving policy for the Contingency Reserve, the Board's "policy" must be determined every time that they make a crediting decision. It is not clear whether the Board must place 2004 earnings in the Contingency Reserve, or whether they have discretion to "declare" the reserve adequately funded and "credit the reserve with zero dollars". The Board does have total discretion over crediting the Capital Preservation Reserve whenever available earnings are positive.

2. Funding Adequacy for Contingency and Capital Preservation Reserves

One issue before the PERS Board is the potential financial impact if part or all of the 2003 PERS reform legislation is reversed. At the same time, it is unclear as to the probability of such an occurrence. The Contingency Reserve, even if combined with the Capital Preservation Reserve, would be inadequate to offset the potential impact if all or significant portions of the reform legislation are overturned. On the other hand, if the 2003 legislation is sustained, the current balance in the Contingency Reserve may be adequate for other uses. The Capital Preservation Reserve cannot be used to directly offset the liability impact from the reversal of the reform legislation, but it could be used to mitigate the resulting impact on employer rates by distributing reserve dollars to Tier Two member, retiree and employer reserves.

3. Employer Rate Relief

The PERS Board is faced with a significant increase in employer contribution rates, due to the unprecedented investment losses of 2000 to 2002, which will move the rates to historically high levels for the near term. By reserving less in the Contingency Reserve, the PERS Board can credit more earnings to Employer and the Benefits-In-Force Reserves, which ultimately will have an overall downward effect on employer rates under future valuations. When earnings are placed in the Contingency Reserve, those earnings cannot be used to offset pension liabilities for rate setting purposes. The more dollars placed in the Contingency Reserve, the fewer dollars can be counted toward lower employer rates. It must be noted that if earnings are credited to the Employer and BIF, they will also be available for crediting to member accounts which will increase system liabilities. However this liability increase is more than offset by the crediting to the Employer and BIF Reserves as member accounts compose only approximately 25% of total reserves. The same effect is currently true for the Capital Preservation Reserve.



Oregon

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February 7, 2005

MEETING	2-18-05
DATE	
AGENDA	C.3.
ITEM	Equal to or Better Than (ETOB)

TO: Members of the PERS Board
Key Reviewer: Brenda Rocklin

FROM: Steven Patrick Rodeman, Administrator, PPLAG

SUBJECT: Adoption of Division 30 Rules “Equal to or Better Than” (ETOB) Related to Local Public Employer Retirement Plans for Police Officers and Firefighters

OAR 459-030-0000, *Definitions (Repeal)*
OAR 459-030-0001, *Petition of Public Employer for Exemption of Police Officers and Firefighters from Participation in the System (Repeal)*
OAR 459-030-0011, *Reexamination of Exemption (Amend)*
OAR 459-030-0025, *Standards for Review of Police Officers and Firefighters Retirement Plans (Amend)*
OAR 459-030-0030, *Board Action on Petition and Review of Order (Amend)*

OVERVIEW

- **Action:** Adopt modifications to OAR 459-030-0011, 459-030-0025 and 459-030-0030; repeal OAR 459-030-0000 and 459-030-0001.
- **Reason:** House Bill 3020 amended ORS 237.620 to require biennial ETOB testing of retirement plans administered by public employers of police officers and firefighters. These rule changes are also intended to address issues created by the addition of OPSRP and the restriction of options for new public employees in Oregon.
- **Policy Issues:**
 1. Should ETOB plans be compared with PERS Chapter 238, OPSRP, or some combination of the two?
 2. Should the administrative rules mitigate negative impacts on individual employees joining OPSRP once their employers lose their ETOB exemption?
 3. How should employers who fail the ETOB test join PERS and what should the effective date be?
 4. Should PERS consider the use of an alternative testing methodology for ETOB testing if it is less costly to employers and more time efficient than the old testing approach?
 5. Should PERS consider additional factors other than the statutorily required two-year period that can trigger an ETOB review?

BACKGROUND

ORS 237.620 provides that all public employers of police officers and firefighters must participate in PERS with respect to those employees. However, ORS 237.620(4) exempts a public employer from this requirement if it provides an alternative retirement plan that is “equal to or better than” PERS’ retirement benefits. A 2003 legislative change to the statute added the requirement that the Public Employees Retirement Board test ETOB employers every two years to determine whether the public employer’s plan complies with the “equal to or better than” requirements.

PERS has conducted four comprehensive ETOB reviews, in 1973, 1979, 1981 and 1990. The 1990 review was performed by Milliman USA and included 20 ETOB public employers. Only the City of Portland’s plan was found to be ETOB and approved for an exemption. Of the remaining employers, three joined PERS and the remaining 16 amended their plans and were granted an exemption after the actuary retested their plans. Since 1990, six of the exempt employers have either joined PERS or dissolved. The ten remaining exempt public employers are: the cities of Forest Grove, Portland, Seaside, Springfield and The Dalles; the counties of Morrow, Tillamook, Union and Wheeler; and Mid-Columbia Fire and Rescue.

An advisory committee comprised of ETOB employers and member representatives convened to review the policy issues presented. The committee members reached consensus around the process and on many of the policy issues involved. Those areas of disagreement will be discussed below.

SUMMARY OF RULES, POLICY ISSUES AND MODIFICATIONS TO RULES SINCE NOTICE

The proposed rule modifications clarify the testing process for employers. Specifically, the rules specify testing against OPSRP as the plan into which employees would be transferred. Additionally, the rules establish the requirement to use a hypothetical data set for testing purposes and a January 1 effective date of participation in OPSRP for those employers who fail the test (unless the Board specifies a different date).

Staff has made some modifications to these rules since they were last presented. The only substantive change was to OAR 459-030-0030. That rule provides a period for amending a failing plan. The advisory committee reached consensus that a plan amendment should be permitted and the rule had to be modified from its original version to make sure the Board’s order on the exemption was issued only once, giving all parties a clean process for review if that becomes necessary.

The rules raise five policy issues for the Board to consider.

- 1. Should ETOB plans be compared with PERS Chapter 238, OPSRP, or some combination of the two?*

Police officers and firefighters who participate in their employers’ ETOB plans are not members of PERS. Based on the 2003 Oregon Legislature’s changes, no public employees are allowed to join the PERS Chapter 238 Program after August 29, 2003.

The only option provided by law for those employees of failed plans was to go into OPSRP, making that the appropriate plan for ETOB comparison.

Some stakeholders believe the intent of the ETOB statute is to compare the employee's entire career under both plans and provide them with the most advantageous plan based on that comparison. Specifically, in a previous letter to the Board, Mr. Greg Hartman urges the Board to make a policy choice about how the statute should be implemented before constructing a test to compare plans.

Staff requested a legal opinion about what options the Board had should a plan fail to qualify for an ETOB exemption. The opinion from Keith Kutler with the Department of Justice was that the Board had no options but must instead place employees prospectively in OPSRP. The rules are constructed based on this direction. Please note that while not all advisory committee members shared in Mr. Kutler's conclusion, they all did have an opportunity to review his advice, ask supplemental questions, and discuss this advice at a meeting of the committee with Mr. Kutler in attendance.

Based on legal counsel's conclusion, staff does not present a policy choice. Instead, the rules require that a failed plan's employees can only come into OPSRP prospectively and the tests are to be conducted in a manner consistent with that result.

2. *Should the administrative rules mitigate negative impacts on individual employees joining OPSRP once their employers lose their ETOB exemption?*

Some employees who are required to go from an ETOB plan into OPSRP may receive less overall benefits, especially for some long-term employees. Past practice of PERS has been to conduct a plan-to-plan review rather than compare effects on individual employees. There is no provision in the proposed rules to allow testing or mitigation for negative impacts on individuals because the advisory committee's consensus was that testing should occur at the plan level and without consideration for individual impacts.

3. *How should employers who fail the ETOB test join PERS and what should the effective date be?*

As discussed in relation to Issue #1, legal counsel reviewed the options for having members join the PERS Chapter 238 Program and OPSRP retroactively. As no other options emerged, the rule provides that employees from failing plans will join OPSRP. The rules also specify a January 1 beginning date, or other date set by the Board in its order denying the exemption. The advisory committee concurred with the effective date.

4. *Should PERS consider the use of an alternative testing methodology for ETOB testing if it is less costly to employers and more time efficient than the old testing approach?*

Milliman USA reported that the 1990 ETOB testing was complicated, expensive and time-consuming. Mark Johnson proposed a more efficient and less costly testing methodology using hypothetical data sets rather than historical data sets. As first proposed, the rules required the actuary to use a hypothetical data set methodology. Some advisory committee members wanted a choice between the use of hypothetical and historical data sets. According to Mercer, if the comparison is based on prospective entry into OPSRP, they can conduct the test based on either historical or hypothetical data, so

long as the employer supplies the needed data in a timely manner and is willing to absorb the extra marginal costs. The rules as presented have been modified to allow this option to employers.

5. *Should PERS consider additional factors other than the statutorily required two-year period that can trigger an ETOB review?*

ETOB employers were last tested in 1990. The ETOB statute now requires testing every two years. The proposed rules do not provide for additional review triggers because committee members agreed that with testing every two years, additional review triggers are unnecessary.

LEGAL REVIEW

The proposed rules were submitted to the Department of Justice (DOJ) for legal review. The legal counsel's comments and recommended changes are incorporated in the rules presented for adoption. Additionally, DOJ's Keith Kutler has provided several letters and messages related to this issue that are included with this packet. Staff has distributed Mr. Kutler's opinions and comments to the advisory committee members to allow for feedback before the rule modifications are adopted.

PUBLIC COMMENT AND HEARING TESTIMONY

PERS held a public hearing for these rules on December 28, 2005. Steve Manton, representing the city of Portland, emphasized support for OAR 459-030-0025, sections (2), (3) and (6), as written. Ardis Belknap, representing the city of Springfield, appeared to ask if PERS' staff needed any clarification on the letter that Everett Moreland sent to PERS on the city's behalf. PERS' staff had no questions for Ms. Belknap.

PERS staff has also received written comments from Everette Moreland, counsel for the city of Springfield, Greg Hartman, counsel for the Portland Police Association, the Portland Fire Fighters and the Oregon State Fire Fighters Council, and Craig Schwinck representing Tillamook County. Staff's practice with material related to this issue has been to share submissions with the other members of the advisory committee so all members have the same opportunity to review and respond to comments. PERS staff is including all written submissions as attachments to the board memo.

The ETOB Advisory Committee convened on March 19, 2004, October 26, 2004, January 14, 2005 and February 2, 2005. Synopses of those meetings are included as attachments to the board memo. To allow the ETOB Advisory Committee and other members of the public to review and provide comment on subsequent revised drafts of the proposed rules, as well as the issues discussed in this memo, the public comment deadline has been extended to include February 18, 2005. The comment period will end during the meeting when Board Chair Pittman calls for an end to the public's deliberations on these rules.

IMPACT

Mandatory: Yes, the current rules need to be amended to comply with new legislation.

Impact: Provides clarification about the testing process for public employers with retirement plans that are exempt from ORS Chapter 238 and 238A.

Cost: There are no costs because ORS 237.620 already requires ETOB employers to bear the costs associated with testing their ETOB status.

RULEMAKING TIMELINE

November 2004	Notice of Rulemaking to the PERS Board.
November 15, 2004	Staff begins the rulemaking process. Deadline to file Notice of Rulemaking with the Secretary of State.
December 1, 2004	<i>Oregon Bulletin</i> published the Notice and the public comment period began.
December 28, 2004	Rulemaking hearing held at PERS headquarters in Tigard.
January 14, 2005	ETOB Advisory Committee Meeting.
January 20, 2005	Notice that the public comment deadline was extended to February 18 was mailed to interested parties and legislators.
January 25, 2005	First reading of the proposed rules.
February 2, 2005	ETOB Advisory Committee Meeting.
February 18, 2005	Public comment deadline. Rules are presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The Board may:

1. Make a motion to “adopt modifications to OAR 459-030-0011, 459-030-0025 and 459-030-0030 and repeal OAR 459-030-0000 and 459-030-0001, as presented, effective upon filing.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** These rules need to be changed to comply with new legislation and to provide clarification of the ETOB testing process.

Adoption – OAR 459-030-0000 to 0030

2/7/2005

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If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is warranted.

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 030 –LOCAL PUBLIC EMPLOYER RETIREMENT PLANS
FOR POLICE OFFICERS AND [FIRE FIGHTERS]FIREFIGHTERS

OAR 459-030-0000 is Repealed:

1 **[459-030-0000**

2 **Definitions**

3 *As used in this division:*

4 (1) *“Fire Fighter” means persons employed by a city, county or district whose duties*
5 *involve fire fighting, but does not include volunteer fire fighters;*

6 (2) *“Police Officer” includes police chiefs and policemen and policewomen of a city who*
7 *are classified as police officers by the council or other governing body of the city; sheriffs and*
8 *those deputy sheriffs whose duties, as classified by the county governing body, are the regular*
9 *duties of police officers; county adult parole and probation officers, as defined in ORS 181.610,*
10 *who are classified by the county governing body as police officers pursuant to ORS 237,610 and*
11 *ORS 237.620; corrections officers as defined in ORS 181.610(2); and employees of districts*
12 *whose duties, as classified by the governing body of the district, are the regular duties of police*
13 *officers; but “police officer” does not include volunteer or reserve police officers, or persons*
14 *considered by the respective governing bodies to be civil deputies or clerical personnel.*

15 (3) *“Public Employer” means any city, county or district that employs police officers or*
16 *fire fighters*

17 (4) *“Valuation Date” means the date set by the Board as of which the retirement benefits*
18 *under the public employer’s retirement plan and under the PERS retirement plan shall be*
19 *compared.]*

Stat. Auth: ORS 238.650

Stats. Implemented:

Hist.: PERS 1-1989, f. & cert. ef. 12-4-89

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 030 –LOCAL PUBLIC EMPLOYER RETIREMENT PLANS
FOR POLICE OFFICERS AND [FIRE FIGHTERS]FIREFIGHTERS**

OAR 459-030-0001 is Repealed:

- 1 ***[459-030-0001***
- 2 ***Petition of Public Employer for Exemption of Police Officers and Fire Fighters From***
- 3 ***Participation in the System***
- 4 *If a public employer provides retirement benefits to its police officers and fire*
- 5 *fighters which are equal to or better than the benefits which would be provided to them*
- 6 *under the PERS, the public employer may petition the Board for exemption from*
- 7 *participation of such employees.]*

Stat. Auth: ORS 238.650

Stats. Implemented: ORS 237.620

Hist.: PER 4-1978, f. & ef. 11-2-78; PERS 1-1989, f. & cert. ef. 12-4-89

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 030 –LOCAL PUBLIC EMPLOYER RETIREMENT PLANS
FOR POLICE OFFICERS AND [FIRE FIGHTERS] FIREFIGHTERS

OAR 459-030-0011 is Amended as Follows:

1 **459-030-0011**

2 [Reexamination of] **“Equal To or Better Than” Exemption**

3 (1) [Any exemption granted under this division shall continue only so long as the
4 retirement benefits are not increased under PERS and are not decreased under the public
5 employer’s plan.] **If a public employer provides retirement benefits to its police**
6 **officers and firefighters that are equal to or better than the benefits that would be**
7 **provided to them under the Oregon Public Service Retirement Plan, the public**
8 **employer may petition the Board for exemption from participation of such**
9 **employees. Such petition will be reviewed under the requirements and timelines of**
10 **this division.**

11 (2) [Whenever legislation increasing PERS retirement benefits is adopted, the
12 Board shall set a valuation date and notify each exempt public employer of the valuation
13 date and the deadline for filing a new petition for continued exemption. If a public
14 employer fails to meet the deadline, then the public employer’s exemptions shall expire
15 and the public employer shall become a participant in PERS with respect to its police
16 officers and fire fighters retroactive to the valuation date.] **The Board will review any**
17 **exemption granted under this division every two years to determine whether the**
18 **exempt public employer is complying with the requirements of this division.**

19 [(3) Whenever a change decreasing the public employer’s retirement benefits is
20 adopted, the public employer shall file with the Board a new petition for exemption. If the

1 *public employer fails to file a new petition within 60 days of adoption (or the date the*
2 *change in retirement benefits takes effect, if later) then the exemption shall expire and the*
3 *public employer shall become a participant in PERS with respect to its police officers*
4 *and fire fighters to that date.]*

Stat. Auth: ORS 238.650

Stats. Implemented: ORS 237.620

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 030 - LOCAL PUBLIC EMPLOYER RETIREMENT PLANS FOR
POLICE OFFICERS AND ~~[FIRE FIGHTERS]~~FIREFIGHTERS

OAR 459-030-0025 is Amended as Follows:

1 **459-030-0025**

2 **Standards for Review of Police Officers and ~~[Fire Fighters]~~Firefighters Retirement**
3 **Plans**

4 (1) A determination whether a public employer provides retirement benefits to its
5 police officers and ~~[fire fighters]~~ firefighters ~~[which]~~ **that** are equal to or better than the
6 benefits ~~[which]~~ **that** would be provide to them under ~~[PERS]~~ the Oregon Public
7 Service Retirement Plan (OPSRP) ~~[shall]~~ **will** be made as of the valuation date. **The**
8 **“valuation date” is the date set by the Board as of which the retirement benefits**
9 **under the public employer’s retirement plan and under the OPSRP retirement plan**
10 **shall be compared.**

11 **(2)** The Board ~~[shall]~~**will** consider the aggregate total actuarial present value of all
12 retirement benefits accrued since July 1, 1973 and projected to be accrued after the
13 valuation date by the group of police officers and ~~[fire fighters]~~firefighters employed on
14 the valuation date by the public employer. **The projected benefits will compare the**
15 **total value of benefits that would be accrued if the police officers and firefighters**
16 **became members of OPSRP or remained in the plan being evaluated.**

17 **(a)** The Board ~~[shall]~~**will** not require that every retirement benefit for each
18 individual employee be equal to or better than the particular benefit he or she would
19 receive under ~~[PERS]~~ OPSRP.

1 (b) The Board [*shall, however,*] **will** require that the public employer's retirement
2 plan or plans provide at least eighty percent (80%) of the actuarial present value of
3 projected retirement benefits in each of the major categories of benefits available under
4 [*PERS*] **OPSRP**, namely: A service retirement; a disability retirement; a death benefit;
5 and vesting.

6 ([2]3) **In conducting an actuarial review of a public employer's retirement**
7 **plan for its police officers and firefighters, the actuary retained by the Board will**
8 **use demographic data supplied by the employer to determine whether the**
9 **retirement benefits provided under the plan are equal to or better than the benefits**
10 **which would be provided under OPSRP. If the employer does not provide sufficient**
11 **data in a timely manner, the actuary will use a hypothetical data set representing a**
12 **demographic cross-section of police officers and firefighters who are subject to this**
13 **division.**

14 ([2]4) The Board [*shall*]**will** conduct its review based on its current actuarial
15 assumptions for police officers and [*fire fighters*]**firefighters** of public employers in
16 [*PERS*] **OPSRP**.

17 ([3]5) The Board [*shall*] **will** consider the cost of the benefits to be provided and
18 the proportion of the cost being paid by the public employer and the participating police
19 officers and [*fire fighters*]**firefighters**. The Board [*shall*]**will** consider whether the
20 benefits to be provided by the employer are funded, and the adequacy of funding.
21 Whether the benefits are provided by contract, trust or insurance, or a combination
22 thereof shall have no effect on the decision to grant or deny the petition.

1 ([4]6) In considering a public employer’s retirement plan provisions the Board
2 [*shall*]**will** not value portability of pension credits, tax advantages, **Social Security**
3 **benefits or participation,** and any worker’s compensation component of a public
4 employer’s plan as determined by the employer.

5 *[(5) In valuing PERS benefits the Board shall consider the actuarial present value*
6 *of future PERS ad hoc benefit increases. A public employer shall be given the option of*
7 *indicating an intent to match each future PERS ad hoc benefit increase in lieu of*
8 *evaluating PERS benefits with the ad hoc assumption. A public employer who elects this*
9 *option and whose plan benefits are in all other respects equal to or better than PERS*
10 *benefits shall be given an exemption conditioned upon adoption of future PERS ad hoc*
11 *increases. An employer who fails to adopt an ad hoc increase or who fails to provide*
12 *written confirmation of adoption within 60 days of request by PERS shall be required to*
13 *immediately undergo a new valuation utilizing the PERS ad hoc valuation assumption.]*

14 ([6]7) Additional actuarial assumptions as shall be needed to evaluate public
15 employer plan provisions shall be considered by the Board’s actuary to be consistent with
16 assumptions specified in these rules. Any disputes as to the appropriateness of additional
17 actuarial assumptions shall be resolved by the Board in its sole discretion.

Stat. Auth: ORS 238.650
Stats. Implemented: ORS 237.620

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 030 –LOCAL PUBLIC EMPLOYER RETIREMENT PLANS FOR
POLICE OFFICERS AND ~~[FIRE FIGHTERS]~~FIREFIGHTERS

OAR 459-030-0030 is Amended as Follows:

1 **459-030-0030**

2 **Board Action on Petition and Review of Order**

3 (1) The actuary will issue a written report that concludes whether a public
4 employer’s plan meets the standards for receiving an exemption under OAR 459-
5 030-0025. After [Upon] receipt of the written actuarial review report and
6 recommendations of staff, the Board [at a public meeting without hearing any testimony
7 shall] will issue an order granting or denying the petition for exemption. No order
8 denying a petition for exemption will be issued until at least 90 days after the
9 actuary had delivered its report to the Board. During that period, the public
10 employer may amend its plan to comply retroactive to the valuation date or file a
11 written request for an extension. Upon filing of that request, the Board will not
12 enter an order denying a petition for exemption for an additional 60 days after
13 receiving the request. If a public employer submits an amended plan before the
14 Board adopts an order denying the exemption, the actuary will submit a
15 supplemental report on whether the amended plan meets the required standards
16 under OAR 459-030-0025. The Board may adopt an order at any time after
17 receiving the supplemental report.

18 (2) *[The order shall be final unless:*

1 (a) Within 120 days the public employer amends its plan to comply retroactive to
2 the valuation date or files a written request for an extension. Upon filing of the request,
3 the public employer shall have an addition 60 days to so amend; or

4 (b)] Within 60 days **of the effective date of any order issued under this rule,**
5 the public employer, the affected public employees, or their labor representative **may**
6 file[s] a petition for rehearing or reconsideration pursuant to OAR 459-001-0010 and
7 459-001-0040.

8 **(3) A public employer who has received an order denying its petition for**
9 **exemption and who has exhausted its remedies under this division will join the**
10 **Oregon Public Service Retirement Plan as of the following January 1, or such other**
11 **date as the Board directs in its order.**

Stat. Auth: ORS 238.650
Stats. Implemented: ORS 237.620

PUBLIC EMPLOYEES RETIREMENT SYSTEM
ADVISORY COMMITTEE MEETING

Advisory Committee
On “Equal To Or Better Than” Testing

PERS Headquarters
Boardroom
11410 SW 68th Parkway
Tigard, OR

October 26, 2004
1:00 PM – 3:00 PM

MINUTES

Staff Facilitator:

James Harris

Staff:

David Martin
Steve Rodeman
Brendalee Wilson
Dale Orr
Debra Hembree
Steve Delaney

Committee/Visitors:

Mark Johnson	
Greg Hartman	Michelle Deister
Pat West	Steve Manton
Ardis Belknap	Hasina Squires
Everett Moreland	
Maria Keltner	
Leo Painton	
Susan Dobrof	

At 1:00 p.m., James Harris opened the discussion. Brendalee Wilson explained that PERS was entering into the rulemaking process for the ETOB testing process.

The purpose of the meeting was to review “equal to or better than” (ETOB) testing, as provided for in ORS 237.620(4). House Bill 3020 (2003 Legislative Assembly) amended the statute to require retesting every two years. Prior to this amendment, retesting was triggered by a “substantial change” to ORS chapter 238. PERS has not conducted an ETOB test since 1990.

The committee began its discussion with Everett Moreland who stated that OAR Rules that still make sense should not be thrown out, although testing is now required every two years. Ardis Belknap noted that with the city of Springfield, which came into through intergration, some employees were better off and some were not but the employees were fully aware that this situation could and would occur.

Greg Hartman noted that the 1971 legislature passed the ETOB statutes to protect employees not just to protect employers. Greg also said that PERS should develop a testing plan that is consistent with that statutory perspective. Greg Hartman added that the PERS’ board needs to address the policy issues relating to ETOB.

The committee discussed the ETOB policy issues that staff has identified thus far. These issues are presented for information and discussion purposes and are not intended to be all-inclusive.

ETOB POLICY ISSUES

1. Should employers who fail the ETOB test have the option to amend their plans and make them compliant so that they may continue their exemption status?

Everett Moreland began the discussion. By consensus, the committee agreed that it wanted an opportunity for employers to amend their plan as necessary so that they may continue their exemption status. Mark Johnson stated that past practices have allowed a provisional test wherein the board did not take action on it and employers who failed provisionally were given the opportunity to amend their plans and then be retested.

2. What are the factors of a plan that should be compared? For example, should there be a comparison of individual “benefits” to individual “benefits” or should there be an overall “benefits scheme” to “benefits scheme” comparison?

Mark Johnson began the discussion and noted his experience with the 1990 ETOB test. Mark added that previously the testing was based on a plan scheme by plan scheme comparison. There was a discussion about which employers in PERS were also part of the social security system. The committee reached a consensus on a plan-to-plan comparison with a testing of the same elements as tested previously.

3. Does the imposition of PERS (or OPSRP) on previously exempt employers create an unfunded mandate in violation of the state Constitution?

The committee and staff deemed this question more appropriate for PERS’ legal counsel.

4. Should PERS begin identifying rural fire protection districts that are not in compliance with ORS 237.620 or instead wait until such fire districts are presented to the agency?

Hasina Squires began the discussion and noted that of the rural fire protection districts she has come in contact with most are aware of PERS and are either in PERS or don’t have paid employees. Several committee members did not think there was a problem in this area nor did they think there was any issue here.

5. Should there be a statutory definition of “benefits”?

The committee’s discussion here referred back to Question 2 and reiterated that what was compared or included in the 1990 testing methodology should be compared or included again in the 2005 testing.

6. It has been suggested that employees, especially long-term employees, may be “harmed” when they go from an exempt employer’s plan into PERS/OPSRP? If this is the case, what should be done to mitigate any negative impact on affected employees?

Everette Moreland began the discussion noting that the city of Springfield offers a long-term disability benefit that is outside of its retirement plan. This benefit was considered in the 1990 testing process and should be considered and included in the 2005 test. Mark Johnson agreed and indicated that there were occasions in the 1990 testing where ETOB employers offered benefits (i.e., long-term disability and death benefits) outside of their plans and those benefits were considered and included for ETOB testing purposes. Greg Hartman indicated that considering such benefits for testing purposes is appropriate but if any such benefit goes away then that ETOB exemption needs to be reexamined. Steve Manton pointed out that the Oregon Attorney General opined that only if PERS changed its benefits should there be a need for a retest. However, this point is moot due to the two-year testing requirement. Mark Johnson stated that it is not possible to design the test unless you know what is possible as a result of failing the test. Mark added that no matter what plan an individual may go into there are going to be some individuals who are worse off than before joining PERS. However, the approach is not to look at plan members individually but instead to look at plan members in aggregate. Greg Hartman stated his clients are not proposing individual testing but there is concern that we do not adopt a methodology that is likely to harm people. Greg supports full career testing and Mark supports testing prospectively against the plan the member will be joining including the member's past service.

7. Should additional factors other than the statutorily required two-year period trigger an ETOB review (i.e., whistleblowers)?

There was some discussion that this issue had come up before due to an employee coming forward asking that an employer be tested. It was discussed that previously only PERS could declare an employer was out of compliance with ETOB. However, the discussion concluded that due to the 2-year statutory testing requirement there was no need for any other testing triggers. The committee reached a consensus that no other factors should trigger an ETOB test.

8. What process should occur if an exempt employer fails the test? For example, how does an employer who loses its exemption come into PERS or OPSRP? How is the effective date of membership determined?

This issue boils down to a legal question in terms of what options PERS may have in bringing an employer over into the PERS retirement system. Everett Moreland discussed what if the remedy was going into OPSRP on a prospective basis and what is that "effective date." Everett concluded that based on his reading of the current rules on employer's appeal rights, he believes the effective date of joining OPSRP should be the date the PERS Board's order becomes final, which should avoid retroactive OPSRP participation. However, one disadvantage would be that allowing appeals could delay the effective date. Both the employers and employees are entitled to an appeal so any delay would be on both sides.

Brendalee Wilson observed that one consideration would be the option of joining at the first of the following year that an employer fails the test. Steve Manton observed that since many employers budget on a fiscal year basis, it is probably more feasible for employers who fail the test to join on a fiscal year basis. Greg Hartman asked what is the projection for when the testing will occur and is there a planned cutoff date after which the testing would be conducted. It is not clear whether the test

must be completed by July 1 of next year or whether it must commence by that date. Brendalee Wilson commented that testing can begin any time after the rule is adopted, but it not known at this time what the length of the testing would be; however, it probably depends on what is being tested. The issue of what is a reasonable and appropriate effective date was left off until the next meeting.

Pat West raised the point that every discussion that has occurred down in the state capitol when policy-makers are determining what is an adequate benefit for PERS takes into account social security. Pat added that the benefit level for PERS is based on social security plus the PERS benefit and PERS own statement indicate that it takes into account social security. Pat's position is that social security should be part of the test. Steve Manton noted that a number of employers are not in social security but are providing a PERS benefit. Greg Hartman noted that social security is a voluntary action undertaken by an employer. Steve Delaney stated that the only requirement for social security is if there is no retirement plan provided at all. Mark Johnson pointed out there would be no need to test for social security if it is not part of the benefit scheme provided under PERS.

9. If employers lose their exemption and are required to go into either PERS or OPSRP, what are the determining factors for whether an employer goes into PERS or OPSRP?

Steve Manton asked whether the test should go back to 1973. Mark Johnson responded that if someone has service back to 1973 then we ought to count it, if we are going to go backwards. Ardis Belknap said that testing should be from the participation in the plan not from the date of hire. There was discussion that if there was the ability to go into PERS as well as OPSRP, then PERS would look at the date of participation in the exempt plan to determine what tier an employee would join. Everett Moreland disagreed with this approach and stated that Chapter 238A should solely determine where an employee should go.

10. Should ETOB testing be conducted with hypothetical as well as average data sets rather than creating historical data sets?

Mark Johnson explained the hypothetical data set. Mark stated that collecting actual data is complex, time consuming and expensive. Everett Moreland proposed that employers be given the option that if they wanted to pay the extra cost then they would be allowed to used actual data, if they do not then let them use the hypothetical data set. Mark Johnson responded that a particular employer with a closed plan is not going to look like the average PERS' employer, but there are ways to fix that. Mark added that he would develop the hypothetical data set from selective PERS' employees. Everett noted that it was important to preserve the employer option of either an actual or a hypothetical data set. Mark responded that if there was going be a choice provided then he would recommend using actual data. Greg Hartman noted that unless employers felt very strongly that the development of a hypothetical data set would be a good idea, then we should just forget the whole idea. Everett Moreland clarified that he thought that the hypothetical data set was a wonderful idea but he was proposing that each employer be given an option to avoid the potential of an unfounded mandate question.

PERS' staff will review the committee's remarks to determine what the next steps in the process will be and what legal questions should be presented to the DOJ. PERS' staff will draft a rule based on the

committee's comments and open the public comment period. The committee agreed that any members' comments would be made available to the other members of the committee.

Respectfully submitted,

James Harris
Policy Analyst

PUBLIC EMPLOYEES RETIREMENT SYSTEM
ADVISORY COMMITTEE MEETING

Advisory Committee
On “Equal To Or Better Than” Testing

PERS Headquarters
Boardroom
11410 SW 68th Parkway
Tigard, OR

January 14, 2005
2:00 PM – 4:00 PM

MINUTES

Staff Facilitator:

James Harris

Staff:

David Martin
Steve Rodeman
Brendalee Wilson

Committee/Visitors:

Marcia Chapman	Paul Downey
Greg Hartman	Bob McCrory
Pat West	Steve Manton
Ardis Belknap	Bill Hallmark
Everett Moreland	
Craig Schwinck	
Ken McGair	

At 2:00 p.m., James Harris opened the discussion with an overview of the meeting’s agenda.

The purpose of the meeting was to review “equal to or better than” (ETOB) testing, as provided for in ORS 237.620(4). House Bill 3020 (2003 Legislative Assembly) amended the statute to require retesting every two years. Prior to this amendment, retesting was triggered by a “substantial change” to ORS chapter 238. PERS has not conducted an ETOB test since 1990.

The committee began its discussion with Everett Moreland who inquired whether there would be consideration during the testing of the value of benefits that are outside of the retirement plan, such as long-term disability insurance. PERS’ staff responded that the proposed rules permit the consideration of such benefits. The committee discussed that with testing every two years it makes a difference as to the permanence of a benefit.

The committee discussed Keith Kutler’s draft response on the legal issues posed to the Department of Justice. Bob McCrory asked whether the process would allow opportunities to resolve issues with the actuary before the actuary’s report is issued. Steve Rodeman responded that this could occur under the draft rules and if there were unresolved issues with the actuary’s report then such issues would be presented to the board for resolution. Greg Hartman discussed whether the board would adopt a single

set of testing assumptions for all ETOB employers. Bob McCrory indicated that in 1990 only the city of Portland passed the first time and, while the other ETOB employers were very close, they had to amend their plans in order to pass. Mercer staff noted that a single set of testing assumptions might not provide the flexibility to address the differences incumbent in the ETOB employers. Everett Moreland discussed that it was important the employer had assurance that the actuary understands the plan documents completely. Mercer staff responded that it planned to provide opportunities for feedback on employers' plan documents before it began to crunch any numbers.

The committee discussed Keith Kutler's response that an employer who fails the test can only join OPSRP. Pat West noted that even with Tier 1 and Tier 2, it appears that all employers will be compared with OPSRP. Greg Hartman discussed how the board should articulate a policy and then decide whether that policy can be implemented in a way that is consistent with the statute. Greg added that until that occurs the legal questions are not being asked in the right way and the result is that the legal analysis is driving the policy not vice versa. Steve Manton observed that the legislature has authorized only one plan and that is the plan that must be tested against. Steve Rodeman offered to resubmit a legal question to Keith Kutler asking if the board adopts a policy that allows an ETOB employer to join something other than OPSRP, can it be done under the current statutory structure. Everett Moreland indicated support for Keith Kutler's response that employers who fail the ETOB test can only join OPSRP. Steve Manton asked if an employer who fails the test could join PERS under the integration statutes. Steve Rodeman responded that integration could only occur before an employer fails the test but not after.

The committee discussed whether an employer who fails the test should join PERS as of January 1 of the following year. Greg Hartman indicated that the date should be July 1, 1973, or an employee's date of hire. The committee reached a consensus that there should be a date certain for the purpose of joining PERS in those instances where an employer fails the test. However, the issue of an employer who fails the test joining PERS retroactively to July 1, 1973, remained an open issue for the committee.

Greg Hartman discussed whether Social Security should be included in the test. Steve Rodeman responded that Social Security is not included because whether an employer is in Social Security or is not in it has nothing to do with an employer being equal to or better than PERS. Pat West noted that the state takes into account Social Security when it determines PERS' benefit levels. Everett Moreland indicated that if an employer fails the ETOB test that employer is not then forced into Social Security.

Bob McCrory asked if there would be any unfunded actuarial liabilities assigned to employers who failed the ETOB test. Greg Hartman responded that there are safeguards in place to prevent such a situation from occurring. Steve Rodeman agreed and added that if an employer joined PERS and participated in a pool then that employer would be responsible for the liabilities associated with that pool. Bill Hallmark noted that OPSRP is completely separate and has firewalls so that should not be a problem. Everett Moreland discussed the integration statutes and whether Keith Kutler could give further consideration to that issue. Steve Rodeman responded that it appeared that Keith was approaching the issue in the broader sense by considering whether there is any way to bring in an employee's prior service credit. Steve continued that even if it could occur under the integration statutes it must be done outside of the ETOB statutes.

Everett Moreland asked whether the date certain of January 1 would also be the valuation date. Steve Rodeman responded that the valuation date is the date when the plans would be valued and compared. Steve added that January 1 is the date when an employer would begin participation in PERS. Brendalee Wilson indicated that the board sets the valuation date and the plan comparison occurs as of that date. Bob McCrory asked whether having a different valuation and participation date posed any problems for the actuary. Bill Hallmark responded that Mercer could work with the two different dates, although having the same date would promote a smoother process. Greg Hartman observed that there is nothing in the statutes that precludes making the valuation date and the effective date the same, but then imposing a different participation date. Greg concluded that this is more a question that should be left up to the actuary rather than to the committee.

Paul Downey asked the question whether the legal counsel's position was that no prior service credit would be allowed for employees who are required to join OPSRP. Brendalee Wilson responded that that was the case. Paul added that not allowing prior service credit purchases really damages employees. Brendalee Wilson responded that OPSRP does not allow such purchases nor does it appear that the legislature had contemplated this situation. Ardis Belknap agreed with Paul Downey and added that the city of Springfield completed an integration plan and it would not have occurred if not for the ability of employees to purchase prior service credit. Steve Rodeman commented that the difference was that occurred under the integration statutes and not under the ETOB statutes. The committee discussed whether the prior service credit purchase issue should be presented to the legislature.

The committee discussed the possibility of postponing the test and what would be the consequences of delaying the test for another two years. Brendalee Wilson indicated PERS would begin collecting plan documents and information as soon as possible. Mercer staff agreed that this would be highly beneficial to the testing process. Steve Rodeman indicated that the public comment period would be extended until the board meeting on February 18, 2005. Steve also discussed the options related to extending the public comment period. David Martin explained the requirements under the rulemaking statutory scheme. The committee members agreed to provide any additional written comments to PERS by February 14, 2005. Any comments would be shared with each member of the committee.

Some of the next steps in the process will include PERS' staff review of the committee's remarks and determining what legal questions should be resubmitted to the DOJ. The committee agreed to reconvene on February 2, 2005, specifically for the purpose of meeting with Keith Kutler.

Respectfully submitted,

James Harris
Policy Analyst

**PUBLIC EMPLOYEES RETIREMENT SYSTEM
ADVISORY COMMITTEE MEETING**

Advisory Committee
On "Equal To Or Better Than" Testing

PERS Headquarters

Boardroom
11410 SW 68th Parkway
Tigard, OR

February 2, 2004
2:00 PM – 4:00 PM

MINUTES

Staff Facilitator:

James Harris

Staff:

David Martin
Steve Rodeman
Brendalee Wilson
Dale Orr
Jackie Reep
Steve Delaney

Committee/Visitors:

Jack Finders	Marcia Chapman
Greg Hartman	Keith Kutler
Paul Downey	Steve Manton
Ardis Belknap	Bill Hallmark
Everett Moreland	
Ken McGair	
Craig Schwinck	

At 2:00 p.m., James Harris opened the discussion with an overview of the legal issues and comments that the committee had wanted to address directly with Keith Kutler, PERS' legal counsel at the Department of Justice.

Greg Hartman began the discussion by asking what are the options for employers who fail the ETOB test under current statutes. Greg stated that his reading of the statute permitted those employers to go into PERS Chapter 238, although Keith Kutler does not find such authority under the statutes. Keith Kutler noted that the proposed rules give consideration to what can be done prior to the board's final order that an employer has failed the test.

Greg Hartman emphasized his support for the PERS Board to articulate the policy for ETOB and that should then drive the legal analysis and not vice versa. Greg discussed the legislative origins of prior service credit and concluded that the system today required an employer who joins PERS under ETOB to give prior service credit even after twenty years under this statute. The committee discussed the issue of whether an employer who failed the test should join PERS retroactively. Craig Schwinck asked how an employer could join retroactively when, in fact, that employer had passed an ETOB test previously. Keith Kutler responded that it is not practicable nor does it appear to be legislative intent for an employer to join PERS retroactive to July 1, 1973.

Keith Kutler noted that, in his view, the statute does not provide for a prior service credit in terms of PERS participation. Everett Moreland discussed how buying prior service credit is designed to address employee problems relating to vesting credit, service for disability benefits and service for early retirement. Everett noted that it is prior service before joining PERS not prior service back to

1973. Greg Hartman discussed how the legislature's use of the term "effective date" referred back to July 1, 1973. Keith Kutler addressed how the use of "prior service credit" or "prior service pension" does not make an employee a member of PERS back for 20 years. Greg Hartman offered that it makes sense to give prior service credit to employees for time dating back to 1973, but not for employees who join the system prospectively. Greg emphasized the "effective date" should be July 1, 1973, or the date of hire. Keith Kutler responded that he did not see the necessity for participation to be as of July 1, 1973, in order to make the ETOB process work.

Everett Moreland reported that the employers that he deals with have a significant number of public safety employees who want to stay in the local plan rather than join PERS. Keith Kutler discussed what he described as a fundamental difference on what date is the proper starting point. Keith added that he starts with the statute and proceeds from there. Keith also discussed the delegative authority of the PERS' board that the court addressed in the Salem Firefighter case. The board has the authority to interpret the statutory terms that are given to it. Keith Kutler noted that employers have passed the test in the past and that there is no provision for undoing the passage of a prior test. The effective date is probably going to be the date of the PERS' board order that says an employer's plan is no longer ETOB. Keith discussed how then an employer would join PERS pursuant to ORS 237.620(2).

Greg Hartman discussed how a test if not designed properly could harm ETOB employees. Keith Kutler responded that it must be shown that an employer could fail the ETOB test and its employees would be worse off. Everett Moreland discussed how the test is conducted on an aggregate basis rather than individually and it is constructed prospectively to minimize harm in the aggregate.

Greg Hartman noted how testing prospectively may not harm employees but it also does not protect employees. Greg stated how he supported testing full career rather than prospectively. Mercer staff Bill Hallmark discussed how his company envisioned the test would provide a comparison of how an employee is doing at the transition point.

Everett Moreland discussed how this process must be brought to its logical conclusion. Steve Manton offered that, in terms of hurting employees, this is the same process that occurred in 1989 wherein the system did not match and testing was conducted prospectively and this is the same policy that was implemented last time. Keith Kutler noted that the policy is circumscribed by the statutes because they are the starting point, because that is where one finds the policy, notwithstanding any resulting adverse consequences. Keith added that the board does have some discretion, notwithstanding the legal issues, to design several tests intended to avoid adverse consequences. Craig Schwinck stated that protecting police and firefighters should not take a backseat to maintaining the financial viability of a retirement plan.

Steve Rodeman noted the committee has discussed individual consequences previously and it is addressed in the draft rule 459-030-0025. Steve commented that we need to look at this in the aggregate and not in the individual case. Greg Hartman disagreed with Steve and pointed out that the board has a lot of discretion in what type of test it chooses to use. Steve Rodeman discussed how the questions posed to Keith Kutler were designed to allow for a range of solutions and what we got back from him was a very narrow range. Greg Hartman stated that courts are more likely to give a certain amount of deference to the board for implementing its policy than to the opinions of attorneys who can disagree on the meaning of a statute.

Keith Kutler asked Greg Hartman if it was his goal to insure that if an employer fails the ETOB test, then its employees, both in the aggregate and individually, are not worse off after they come into PERS. Greg Hartman agreed and added that PERS should not do harm to employees in the aggregate, but, instead, should help people. Greg believes that the statute can be construed so that the benefits can be calculated either as if the employee had been in the plan since 1973 or from the employee's date of hire. Keith Kutler noted that it appears Greg Hartman is proposing to ask the board to reconsider its prior determinations that an employer was ETOB. Greg agreed and added that that is the current rule, that PERS should test full career.

Steve Rodeman observed that at the time of the 1990 test, there was no Tier 2 or OPSRP. Steve added that it does not matter about a full career test, if the only place to go is into OPSRP from this point forward and there is no way to get an employee credit or service in PERS prior to that date. Greg Hartman responded that the board has the discretion to make the policy choice and then design a test that implements that policy choice, notwithstanding the statutory construction. Greg added that he is trying to differentiate between legal choices and policy choices.

Everett Moreland discussed how OPSRP does not permit prior service credit and this may be an issue where the actuaries may need some legal guidance. Steve Manton asked if a method previously developed by Mark Johnson to address several of these issues was still valid. Dale Orr agreed to look at this information and provide some feedback to Steve Manton. Everett Moreland asked whether the lost of value of prior service credit will be accounted for in the test. Bill Hallmark said that although OPSRP does not permit vesting credit for prior service that will be factored into the test. Bill added that the test will look at whether the employee is better where the employee is, if so, the employee stays, if not, the employee comes into OPSRP. Keith Kutler observed that the test should necessarily consider all of the constraints and test for that and on that basis the employer would either come into or not come into PERS. Steve Manton asked whether it would be valid since the 1990 test to now only test against Tier 2 and OPSRP. Greg Hartman and Steve Rodeman responded that that related to a Bob Muir response, PERS' former DOJ legal counsel, and it occurred under different circumstances.

Steve Rodeman commented that the draft rules will be presented with staff recommendations for adoption by the board at the February 18 board meeting. Steve noted the public comment period had been extended until February 18. Steve added that comments received by the end of business on February 7 will be included in the board packet. PERS' staff will not condense the comments it has received so that the comments will not be mischaracterized or misinterpreted in the process of synthesizing the comments.

PERS' staff will review the committee's remarks and complete its review of the rules for presentation to the board at the February 18, 2005, board meeting.

Respectfully submitted,

James Harris
Policy Analyst

PUBLIC EMPLOYEES RETIREMENT SYSTEM ADVISORY COMMITTEE MEETING

Advisory Committee
On "Equal To Or Better Than" Testing

State Capitol Building
Room 257
900 State Street
Salem, OR

March 19, 2004
9:30 AM – 11:30 AM

MINUTES

Staff Facilitator:

Debra Hembree

Staff:

Yvette Elledge
Steve Rodeman
Brendalee Wilson

Committee/Visitors:

Mark Johnson
Greg Hartman
Pat West
Bob Livingston
Dallas Weyand
Babette Heeflte
Leo Painton
Susan Dobroff
Brian DeLashmutt
Paul Downey
Gene Parker
Michelle Deister
Steve Manton
Ardis Belknap
Everett Moreland
Maria Keltner
Hasina Squires
Duane Bales
Tracy Holland

At 9:30 a.m., Debra Hembree opened the discussion. Steve Rodeman explained recent legislative changes to the ETOB testing process.

The purpose of the meeting was to review "equal to or better than" (ETOB) testing, as provided for in ORS 237.620(4). House Bill 3020 (2003 Legislative Assembly) amended the statute to require retesting every two years. Prior to this amendment, retesting was triggered by a "substantial change" to ORS chapter 238. PERS has not conducted an ETOB test since 1990.

After a summary of the major policy questions PERS staff has identified, the committee began a discussion that focused primarily on two issues: whether employers whose plans failed the test would be allowed to amend their plans and be retested; and whether an employer whose plan failed the ETOB test would integrate into the old PERS plan or join OPSRP prospectively and retain its prior plan.

DOJ advised, in a letter dated November 21, 2001, that employers could not amend their plans and re-test; however, this advice was not well developed. Everett Moreland suggested that PERS ask DOJ to

reconsider its position. There was general agreement among the committee members that there should be some mechanism in place to allow an employer whose plan failed the ETOB test to amend the plan and have it re-tested. An alternative might be to notify ETOB employers in advance of what the specific testing methodology will be to give them an opportunity to determine whether their plans are likely to pass the test.

The committee discussed the options of a failing employer joining the old PERS plan by integration or keeping its plan and joining OPSRP proactively. Several committee members expressed the opinion that membership should be prospective and employees would retain their benefits under the employer's prior plan. Greg Hartman expressed a concern that this could harm some employees, and stated that the intent of ETOB testing was to ensure that exempt plans would provide the same level of benefits that employees would have earned over the course of their careers had they been under PERS. It was suggested that this was an area where DOJ advice would be helpful.

There was some discussion of the meaning of the term "benefits" as used in the statute. Does it refer to the actual dollar value of an individual's retirement or does it refer to an overall level of benefits in the four major areas (service retirement, disability, death while active, termination before retirement). DOJ advice might be helpful.

Ardis Belknap asked about the cost to employers of retesting. Mark Johnson responded that testing prospectively (if employer's plan fails employees join OPSRP for future service but retain their prior plan benefits for past service) would be less costly than determining what employees' benefits would have been had they been in PERS throughout their careers. Mark also said that using a hypothetical data set, rather than actual employee data, would reduce the cost of the tests. Greg Hartman was opposed to prospective testing because it has been 14 years since the last test, although once we're testing every two years it might work. Maria Keltner noted that hypothetical data sets for Tier 1, Tier 2 and OPSRP would need to be different. Mark said that several different data sets could be used.

PERS staff will review the committee's remarks to determine what the next steps in the process will be and what issues, if any, should be presented to DOJ at this point. The committee will be consulted before rules are drafted to provide additional direction and input.

Respectfully submitted,

Debra Hembree
Integrations Manager



MEMORANDUM

TO: David Martin (to David.Martin@state.or.us)
cc: Ardis Belknap, Benefits Manager, City of Springfield
(to abelknap@ci.springfield.or.us)
Maria Keltner, Executive Director, LGPI (to mkeltner_lgpi@orlocalgov.org)
Greg Hartman (to hartmang@bennetthartman.com)

FROM: Everett Moreland

DATE: November 4, 2004

RE: 11/3/04 draft ETOB rules and Board memo

The City of Springfield submits the following comments on the 11/3/04 draft ETOB rules and Board memo.

Draft ETOB rules

Proposed OAR 459-030-0025(2)

The City believes the addition of "under OPSRP" in the first sentence is unnecessary and confusing. Unnecessary because elsewhere the proposed rules make clear that the comparison is to OPSRP. See Proposed OAR 459-030-0011(1) and 459-030-0025(1), (2)(a) and (b), (3), and (4). Confusing because Proposed OAR 459-030-0025(2) applies to both OPSRP and the local plan; referring only to OPSRP in the first sentence would cause confusion about what the Board is to consider for the local plan.

The 11/3/04 draft of Proposed OAR 459-030-0025(2) appears to provide that a local plan will pass the ETOB test if:

- Benefits under the local plan back to 7/1/73 and projected to be accrued are at least 100% of OPSRP benefits back to 1/1/04 and projected to be accrued; and
- Each of the local plan's projected benefits for service retirement, disability retirement, death, and vesting are at least 80% of such projected benefits under OPSRP.

For the next several years no local plan would fail the test described after the first bullet, because the actuarial present value of its benefits back to 7/1/73 would be much larger than the actuarial present value of OPSRP benefits back to 1/1/04.

Proposed OAR 459-030-0025(3)

The City believes the following changes would improve the provision for a hypothetical data set:

- The reference to a "demographic cross-section of PERS members" should instead be a reference to a "demographic cross-section of police officers and firefighters who are provided retirement benefits under ORS 237.620(4)." ETOB testing asks not whether PERS members would receive comparable benefits under the local plan, but whether local plan members receive benefits that are comparable to OPSRP benefits.
- The rule should require the Board's actuary to refine the hypothetical data set to match certain data characteristics of the local government's police officers and firefighters. Present OAR 459-030-0009(1)(b) asks for the following data about the local government's police officers and firefighters:

names
ages
sex
dates of employment and plan participation
annual employee contributions since 1973
current account balances of employee contributions
total gross salaries paid in each of the three most recent calendar years

This data for a particular local government could vary dramatically from this data for a demographic cross-section of all local governments' police officers and firefighters who are provided retirement benefits under ORS 237.620(4). This variance could occur, for example, where the local government puts all new hires into PERS or OPSRP (such as does the City, which puts all police officers hired after 3/31/96 into PERS or OPSRP) or where the local government's salary level for its police officers and firefighters is substantially lower (or higher) than the average of such salary level for all local governments that provide retirement benefits under ORS 237.620(4).

Mark Johnson proposed at the 10/26/04 meeting of the ETOB Advisory Committee to refine the hypothetical data set where appropriate for a local government. Refining the hypothetical data set would result in low additional burdens where the refinement is for types of data that are easily assembled by the local government and easily assessed by Milliman. The following types of data in the above list would be easily assembled and assessed:

ages
sex
dates of employment and plan participation
current account balances of employee contributions
total gross salaries paid in each of the three most recent calendar years

This excludes only names (which would be irrelevant) and annual employee contributions since 1973.

The City proposes that PERS staff consult with Mark Johnson to determine the components of the data set for which actual data would be easily assembled and assessed, and that PERS staff revise the proposed rule accordingly.

- The rule should preserve for each local government the option to be tested using actual data. Prior testing under the current rules used actual data. The City believes that failure to allow a local government to elect to continue to be tested using actual data could result in an unfunded mandate under Oregon Constitution Article XI, Section 15.

Proposed OAR 459-030-0030(3)

This appears to be vague. Should the "or" be "and"?

Draft Board memo

Pages 2-3, Policy Issue #2

The City believes this discussion would better characterize the situation if it were to read (new matter underlined; deleted matter ~~struck~~):

"Some employees who are required to go from an ETOB employer's plan into OPSRP may receive less overall benefits, especially for some long-term employees. PERS' past practice has been to conduct a plan-to-plan review rather than compare effects on individual employees. There is no provision in the proposed rules or ORS 237.620 to allow testing or mitigation for negative impacts on individuals. Mitigation of negative impacts on individuals would increase the public employer's costs, by requiring the public employer to provide each police officer and firefighter with the better of OPSRP or the alternative retirement plan, and could result in an unfunded mandate under Oregon Constitution Article XI, Section 15. ~~because~~ Stakeholders support that testing occur at the plan level and without consideration for individual circumstances. "

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

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November 15, 2004

James Harris
Public Employee Retirement System
P. O. Box 23700
Tigard, OR 97281-3700

Re: Equal-To-Or-Better-Than Rules
Our File No.: 9431-01

Dear James:

The purpose of this letter is to express substantial reservations about the process which is being followed in developing new rules to administer the equal-to-or-better-than test required by ORS 237.620(4). It is not the purpose of this letter to discuss the details of the proposed rules, but rather to raise a broader concern about the process as I do not think it is likely to fulfill the board's responsibility to carry out the legislative policies inherent in the equal-to-or-better-than statute. This letter is sent on behalf of the Portland Fire Fighters Association, the Portland Police Association, and the Oregon State Fire Fighters Council.

As you are no doubt aware the application of the equal-to-or-better-than test has been controversial virtually since its adoption by the 1971 legislature. That controversy ultimately led to litigation which was resolved in the Oregon Supreme Court in *Salem Fire Fighters Local 314 v. PERB*, 300 Or 663 (1986). I believe there are several important lessons that can be learned by a careful review of the *Salem Fire Fighters* case.

First and foremost, the court has described the phrase "equal-to-or-better-than" as a "delegative term," "in which the legislature gives "an agency the authority, responsibility and discretion for refining and executing generally-expressed legislative policy" and for "completing a value judgment that the legislature itself has only indicated." *Id.* at 667. Thus the first task that the PERS board must undertake in administering this statute is to determine the legislative policy which is to be promoted through PERS administration of the equal-to-or-better-than program. The policy behind the statute is clear: it is meant to make certain that police and fire fighters who are in the PERS system will receive benefits which are equal to or better than those that they would have received had they participated in PERS throughout their career. The basic structure of the law requires all police and fire fighters to become members of PERS effective July 1, 1973 except those employed by employers who wish to take advantage of the equal-to-or-better-than exception. As the Supreme Court noted, that exception

James Harris
November 15, 2004
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was placed in the statute largely to preserve the ability of Multnomah County and the City of Portland to preserve the pension plans that they had then existing for their police and fire fighters.

The most appropriate way to commence this rulemaking process is for the PERS board to develop their understanding of the intention of the legislature and the goals that they intend to achieve through developing a new set of rules for the administration of the equal-to-or-better-than process. Of course to the extent that any stakeholder believes that there was some other, more limited, purpose to the statute they can raise that issue with the board so they can make a determination on the policy that they intend to follow.

Only after that policy has been clearly articulated by the board can the staff with input from stakeholders begin the process of devising a testing mechanism which carries out that underlying policy. As I stated at the recent stakeholders' meeting, our position is that the best way to carry out the legislative intent is with a full comparison of benefits both earned and to be earned by each exempt plan participant based on the PERS plan they would have entered when they began service. Should an employer fail to pass that test, then those employees should become members of PERS effective on their initial date of hire in the PERS plan that would have been applicable to them at that time.

Though no formal legal opinion has been sought I understand that staff as well as some stakeholders believe that such an approach is inconsistent with current PERS statutes. Most particularly, the opinion has been expressed that a failing employer's employees can only be placed into the OPSRP plan. Clearly such a restriction would cause tremendous difficulty in designing a realistic equal-to-or-better-than test which would carry out the intended purpose of the legislation. While we disagree with this narrow interpretation, nonetheless we recognize that ultimately any such testing mechanism must be fully consistent with all PERS statutes. Further we understand that the board will ultimately be guided by the advice they receive from their attorneys about the meaning of the various statutes which may impact this process.

The problem with the proposed rules as prepared by the staff is that they seem to contain statutory limitations on the process rather than focusing on the policy choices which the board must make in administering the equal-to-or-better-than system.

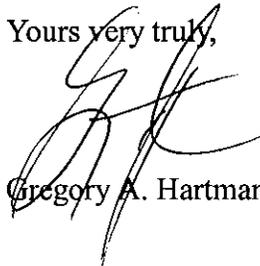
Realistically we all understand that regardless of the outcome of this process there may well be legal challenges by one or more disappointed stakeholders to any action taken by the board. As stated in *Salem Fire Fighters*, it is clear that the courts will defer to PERB in carrying out their discretion is designing an equal-to-or-better-than test as long as it is consistent with the underlying legislative policy. However, the courts will not defer to PERB on issues of statutory construction which may impact the equal-to-or-better-than process. It would ultimately be in the best interests of all stakeholders for the board to create a record in which they clearly identified the areas in which they are exercising their

James Harris
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Page 3

discretion in carrying out the statutory purpose as opposed to those areas where they are following the advice of their attorneys to the extent that limits their exercise of discretion.

I request that you consider revamping your process so that the board at the upcoming board meeting will be given an opportunity to make a clear policy determination about the goals which they believe should be achieved through the equal-to-or-better-than process. Any rules which are then proposed can be tested both against that policy statement as well as against statutory limitations which may impact the process. I trust that you will circulate this letter among all stakeholders as we agreed at our recent meeting.

Yours very truly,



Gregory A. Hartman

GAH:kaj

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cc: Clients
Everett Moreland
Keith Kutler



MEMORANDUM

TO: David Martin (to David.Martin@state.or.us)
 cc: Ardis Belknap, Benefits Manager, City of Springfield (to
 abelknap@ci.springfield.or.us)
 Maria Keltner, Attorney, LGPI (to mkeltner_lgpi@orlocalgov.org)
 Greg Hartman (to hartmang@bennetthartman.com and by fax to 503 248
 6800)

FROM: Everett Moreland

DATE: December 8, 2004

RE: Proposed ETOB rules

The City of Springfield submits the following comments on the proposed ETOB rules.

Legislative policy

The City believes the proposed ETOB rules would implement the Legislature's policy expressed in the ETOB statute. The City also believes the Legislature has not authorized PERB to cease allowing a local government whose plan fails ETOB to choose between either amending its plan to pass ETOB or joining PERS prospectively. As is developed below, the City believes the text of the ETOB statute supports PERB's earlier decision not to require a local government whose plan fails ETOB to join PERS retroactively (providing retirement credit back to six months after the hire date).

The proposed ETOB rules are prompted by the Legislature's decision, expressed in H.B. 2020 (2003), to transition from PERS chapter 238 benefits to OPSRP chapter 238A benefits, and the Legislature's decision, expressed in H.B. 3020, Section 33 (2003), to require PERB to retest ETOB every two years.

The Legislature passed both of these bills in the context of PERB's longstanding decision, expressed in the current ETOB rules, that the remedy for failing ETOB is to allow a local government to choose between either amending its plan to pass ETOB or joining PERS prospectively.

In neither of these bills did the Legislature express its intent that PERB is to cease allowing a local government this choice and instead is to require the local government to join PERS retroactively.

The absence of such a legislative intent is evident from the Legislature's changes to the ETOB statute, which are as follows in their entirety (new matter in **bold**; deleted matter in *[bracketed italics]*):

SECTION 33. ORS 237.620 is amended to read:

237.620. (1) On or before July 1, 1973, all public employers of police officers and firefighters who are not participants in the Public Employees Retirement System shall become participants in the system with respect to the police officers and firefighters employed by them.

(2) All police officers and firefighters in the employ of the public employer on the date the public employer becomes a participant in the system under subsection (1) of this section shall establish membership under the six-month service requirement of ORS 238.015.

(3) The participation of the public employer in the system under this section shall apply to services of its employee police officers and firefighters on and after the effective date of the public employer's participation in the system. The public employer also shall provide a prior service pension for its police officers and firefighters, within the limitations of ORS 238.225 (2) (1999 Edition), for continuous service to the public employer for a period not exceeding 20 years before the effective date of the public employer's participation in the system.

(4) Notwithstanding subsections (1) and (2) of this section, if a public employer provides retirement benefits to its police officers and firefighters [*which*] **that** are equal to or better than the benefits [*which*] **that** would be provided to them under the system, as determined at the expense of the public employer by the Public Employees Retirement Board, the public employer [*shall*] **is** not [*be*] required to participate in the system with respect to its police officers and firefighters. [*This exemption shall continue to apply for only as long as the coverage remains substantially unchanged under ORS chapter 238 but must be reexamined whenever substantial changes are made therein.*] **Once every two years the Public Employees Retirement Board shall review the benefits provided by a public employer that provides retirement benefits to its police officers and firefighters other than through the Public Employees Retirement System to determine whether the public employer complies with the requirements of this subsection.** (H.B. 3020, Section 33 (2003))

The only positive legislative intent expressed or implied in the above text is the expressed intent to require PERB to retest ETOB every two years and the implied intent to require PERB to retest in the context of the transition from PERS chapter 238 benefits to OPSRP chapter 238A benefits.

If the Legislature has implied any intent about whether PERB is to eliminate a local government's choice either to amend its plan to pass ETOB or to join PERS prospectively, the Legislature has implied in two ways its intent to preserve this choice. First, the above text's failure to expressly or impliedly negate the longstanding ETOB rule allowing this choice implies that this choice is to continue. Second, the Legislature passed both the above text and H.B. 2020 with the three-fifths or greater majority of both houses needed to avoid the unfunded mandate requirements in Oregon Constitution Article XI, Section 15. This legislative action to avoid applying the unfunded mandate requirements to retesting ETOB implies that PERB, in implementing the above text and H.B. 2020,

is not to retest in a way that invokes the unfunded mandate requirements, such as by amending the ETOB rules to change the remedy for failing ETOB.

The City believes that taking the above text and H.B. 2020 as authority to change the remedy for failing ETOB would be inconsistent with the Legislature's policy expressed in the 2003 PERS Reform Legislation to redirect PERB, particularly in its prior failure to balance the interests of employees and with those of employers.

The City believes PERB should continue to respect its earlier decision, made nearer in time to the Legislature's addition of the ETOB statute, that the Legislature's policy expressed in the ETOB statute would be implemented by allowing a local government to choose between either amending its plan to pass ETOB or joining PERS prospectively. Greg Hartman, in his 11/15/04 letter to James Harris, states that the Legislature's policy is clear:

The policy behind the statute is clear: it is meant to make certain that police and fire fighters who are in the PERS system will receive benefits which are equal to or better than those that they would have received had they participated in PERS throughout their career. (Emphasis added.)

The City, and apparently also PERB, believe that the Legislature did not express a policy of equality of benefits in all events "throughout their career." PERB has declined to fully implement a "throughout their career" policy, first by testing back to only 7/1/73, and second by allowing a local government whose plan fails ETOB to join PERS prospectively. PERB could have based the first limitation on the Legislature's decision to provide a 7/1/73 effective date in the ETOB statute. PERB could have based the second limitation on the Legislature's failure to provide a mechanism in the ETOB statute for integrating a local plan into PERS such as that provided in the PERS general integration statute, ORS 238.680. PERB could have also based the second limitation on the following ORS 237.620(3), which PERB could have interpreted to be inconsistent with requiring a local government whose plan fails ETOB to join PERS retroactively:

(3) The participation of the public employer in the system under this section shall apply to services of its employee police officers and firefighters on and after the effective date of the public employer's participation in the system. The public employer also shall provide a prior service pension for its police officers and firefighters, within the limitations of ORS 238.225 (2) (1999 Edition), for continuous service to the public employer for a period not exceeding 20 years before the effective date of the public employer's participation in the system. (Emphasis added.)

PERB has long maintained its policy to allow a local government whose plan fails ETOB to choose between either amending its plan to pass ETOB or joining PERS prospectively. This policy is consistent with the language of the ETOB statute and was untouched in the 2003 PERS Reform Legislation. The City believes the language and history of the ETOB statute and the history of PERB's interpretation of the ETOB statute leave Mr. Hartman's clients to seek their remedy with the Legislature, not PERB.

Proposed OAR 459-030-0025(2)

The City believes this would be clearer if it were revised to read as stated in either of the following alternatives. The City prefers Alternative 1, because it is shorter. New matter is in **underlined bold**; deleted matter is in [*bracketed italics*].

Alternative 1

(2) The Board will consider the aggregate total actuarial present value of all retirement benefits accrued since July 1, 1973 and projected to be accrued after the valuation date, **under OPSRP and under the plan being evaluated**, by the group of police officers and firefighters employed on the valuation date by the public employer. [*The projected benefits will compare the total value of benefits that would be accrued if the police officers and firefighters became members of OPSRP or remained in the plan being evaluated.*]

(a) The Board will not require that every retirement benefit for each individual employee be equal to or better than the particular benefit he or she would receive under OPSRP.

(b) The Board will, however, require that the public employer's retirement plan or plans provide at least eighty percent (80%) of the actuarial present value of projected retirement benefits **for the group of employees** in each of the major categories of benefits available under OPSRP, namely: A service retirement; a disability retirement; a death benefit; and vesting.

Alternative 2

(2) The Board will consider the aggregate total actuarial present value of all retirement benefits accrued since July 1, 1973 and projected to be accrued after the valuation date by the group of police officers and firefighters employed on the valuation date by the public employer. **The comparison of accrued benefits will compare the total value of benefits that would have accrued if the police officers and firefighters had been members of OPSRP with their accrued benefits in the plan being evaluated.** The **comparison of** projected benefits will compare the total value of **projected** benefits that would be accrued if the police officers and firefighters became members of OPSRP or remained in the plan being evaluated.

(a) The Board will not require that every retirement benefit for each individual employee be equal to or better than the particular benefit he or she would receive under OPSRP.

(b) The Board will, however, require that the public employer's retirement plan or plans provide at least eighty percent (80%) of the actuarial present value of projected retirement benefits **for the group of employees** in each of the major categories of benefits available under OPSRP, namely: A service retirement; a disability retirement; a death benefit; and vesting.

Proposed OAR 459-030-0025(3)Refining the hypothetical data set

The City's 11/4/04 comments on the 11/3/04 draft ETOB rules ask PERS staff to refine the hypothetical data set. The PERS staff response accompanying James Harris' 11/10/04 email to me states:

Staff believes that such a revision is unnecessary as it may infringe upon both the Board's discretion and the actuary's independence to conduct a professional and thorough actuarial review.

The City believes that refining the hypothetical data set would appropriately limit the Board's discretion and would not limit the actuary's independence. The range of the Board's and the actuary's discretion to refine the hypothetical data set could make the difference between whether a local plan passes or fails ETOB. The City believes that most components of the hypothetical data set do not involve the complexity that would justify such discretion. The City believes that investing the Board and the actuary with an unnecessarily broad discretion would serve the interests of neither local governments nor their public safety employees.

Possible components of a hypothetical data set include the following data components listed in present OAR 459-030-0009(1)(b):

- names
- ages
- sex
- dates of employment and plan participation
- annual employee contributions since 1973
- current account balances of employee contributions
- total gross salaries paid in each of the three most recent calendar years

This data for a particular local government could vary dramatically from this data for a demographic cross-section of all local governments' police officers and firefighters who are provided retirement benefits under ORS 237.620(4). This variance could occur, for example, where the local government puts all new hires into PERS or OPSRP (such as does the City, which puts all police officers hired after 3/31/96 into PERS or OPSRP) or where the local government's salary level for its police officers and firefighters is substantially lower (or higher) than the average of such salary level for all local governments that provide retirement benefits under ORS 237.620(4).

Refining the hypothetical data set would result in low additional burdens where the refinement is for types of data that are easily assembled by the local government and easily assessed by Milliman. The following types of data in the above list would be easily assembled and assessed:

ages
sex
dates of employment and plan participation
current account balances of employee contributions
total gross salaries paid in each of the three most recent calendar years

This excludes only names (which would be irrelevant) and annual employee contributions since 1973.

The City asks PERS staff to consult with the actuary, Mark Johnson of Milliman, to determine the components of the data set for which actual data would be easily assembled and assessed, and to revise the proposed rule accordingly.

Preserving the option to be tested using actual data

The rule should preserve for each local government the option to be tested using actual data. Prior testing under the current rules used actual data. The City believes that failure to allow a local government to elect to continue to be tested using actual data could result in an unfunded mandate under Oregon Constitution Article XI, Section 15.

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December 2, 2004

BY EMAIL AND FIRST CLASS MAIL

Steve Rodeman
Public Employee Retirement System
PO Box 23700
Tigard, OR 97281-3700

Re: ETOB
Our File No.: 9431-01

Dear Steve:

Thank you for forwarding the copy of the legal questions which have been directed to Keith Kutler. Although the questions raised some interesting legal issues I do not believe that they are presented in a manner which will permit Mr. Kutler to give the most useful advice to the PERS board.

As I indicated in my recent correspondence to the PERS board, the term equal-to-or-better-than has been categorized by the Oregon Supreme Court as a delegative term which requires the board to articulate and carry out the underlying legislative policy contemplated by the statutory language. Any testing mechanism developed by the board must be consistent with that underlying policy. However any such testing mechanism must also be reasonably related to the permissible statutory consequences for both employees and employers for failure of that test. As an example, if the statutes would only permit the employees of a failing employer to begin participation in OPSRP on a prospective basis then any comparison with benefits other than OPSRP benefits may not be very meaningful. In fact as Mark Johnson has alerted us any mismatch between testing and the consequence of failure of that testing may actually prove harmful to employees of non-participating employers.

Since the PERS board has not as yet identified the specific policy which is to be achieved a better question directed to Mr. Kutler may be to ask him to describe the choices which may be available to the board should a non-participating PERS employer fail any newly developed testing procedure. As an example should the PERS board adopt the position that the purpose of ORS 237.620 was to provide broad protection for the employees of non-participating employers throughout their career then the logical question which might be asked is whether a failing employer could be compelled to join PERS retroactively to 1973 with their employees falling into Tier One, Tier Two and OPSRP depending on their initial date of hire. Even if Mr. Kutler indicates that such a

Steve Rodeman
December 2, 2004
Page 2

reading of the statutes is permissible the board is not necessarily compelled to adopt that broad reading but would know that it had the ability to do so if it felt that reading was most consistent with the underlying statutory purpose. If, on the other hand, Mr. Kutler believes such a reading is not permissible then he can articulate the limitations and explain to the board what alternative readings of the statute may be permissible. Once Mr. Kutler has identified the options available to the board and the board has articulated the policy to be pursued then hopefully an appropriate testing mechanism can be developed.

I understand that according to our regular operating procedure you will make this letter available to other members of the committee for their comment.

Yours very truly,



Gregory A. Hartman

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December 29, 2004

BY EMAIL AND FIRST CLASS MAIL

Steve Rodeman
Public Employee Retirement System
PO Box 23700
Tigard, OR 97281-3700

Re: ETOB Proposed Rules OAR 459-030-0000 et seq.
Our File No.: 9431-01

Dear Steve:

The purpose of this letter is to provide written comment on the proposed rules noted above. These comments are made on behalf of Portland Police Association, Portland Fire Fighters as well as the Oregon State Fire Fighters Council. The development of these new rules will require the board to articulate the statutory purpose to be achieved, receive advice from the Attorney General on any legal constraints on pursuing those legislative goals, and finally receive advice from the PERS actuary on how the rules will actually function in the testing process. I've already written to the board expressing my client's position on the development of the legislative policy and will not repeat those comments in this correspondence. I will defer any substantial comment on the legal issues until the Attorney General has had the opportunity to weigh in on the questions which have already been proposed. Finally, we have already had substantial actuarial input from Mark Johnson and I assume there will be additional actuarial input from the new PERS actuaries.

Any analysis of proposals for change in the current rules should commence with at least a brief review of those rules to determine whether they would be adequate in carrying out a new equal-to-or-better-than testing procedure. Unfortunately it is clear that the current rules are not adequate. Those rules were developed in the late 1980s and were used for the last equal-to-or-better-than test. Since that time we have had significant change in the PERS system including the adoption of Tier Two in 1995, the adoption of OPSRP in 2003, and most importantly benefits for retirees under PERS are greatly in excess of those that were anticipated in 1990. This is due to over a decade of excellent investment returns the result of which was to increase the value of the money match benefit to the point where it has become by far the predominant retirement vehicle for Tier One participants.

As a result of these changes it is clear that the rules need to be rewritten if for no other reason than to accommodate the development of Tier Two and OPSRP. However more significantly the increase in value of PERS benefits has led to a difficulty with the rules which was first identified by

Steve Rodeman
December 29, 2004
Page 2

Mark Johnson in correspondence to PERS staff dated August 13, 2001. As Mark summarized the current rules make a comparison between all of the benefits that an employer's workforce would have accrued and will accrue under PERS for services subsequent to July 1, 1973 with benefits accrued and to be accrued under the exempt plan. To pass that test an employer's exempt plan must provide at least 100% of the benefits provided by PERS. Under OAR 459-030-0011(2) an employer who failed this test was permitted to join PERS prospectively from the date of the valuation while at the same time freezing the benefits which had accrued under their then-existing exempt pension plan. While this prospective approach may have been acceptable in the 1990 test, as Mr. Johnson demonstrates, using this prospective approach could very well cause members to receive a lower benefit than if they had been allowed to complete their service in the employer's exempt plan. Such a result was clearly not intended by the equal-to-or-better-than mandate of the legislature.

In previous correspondence my clients have suggested that the best way to address this problem is to amend the current rules to provide that an employer who fails the equal-to-or-better-than test will be required to place their members in PERS and depending on each member's employment commencement date, place them in the appropriate system (Tier One, Tier Two, or OPSRP) with credit for all service performed after July 1, 1973. We believe that this approach would avoid the problem identified by Mr. Johnson though presumably that issue can be addressed by the new actuaries.

Rather than addressing the problem identified by Mr. Johnson the rules as proposed by PERS staff leave intact the concept that failed employees will join the system on a prospective basis. Instead the staff proposal amends the testing mechanism so that all testing is done only in comparison with OPSRP benefits. This is despite the fact that for a test administered at this time exempt employers probably have few if any employees who would have participated in OPSRP had they participated in the PERS system. As an example the comparison which will be made for a police officer who became employed by an exempt employer in 1985 will be between the benefits earned and to be earned in the exempt plan and those which would have been earned had the police officer participated in OPSRP commencing in 1985. There is nothing in ORS 237.620 nor its 2003 amendments which suggests that the legislature intended the equal-to-or-better-than test to be administered on the basis of a pension plan which did not exist at the time most employees commenced their employment. Lowering the value of the PERS component by limiting the comparison to OPSRP benefits will make it easier for exempt employers to pass the test thereby potentially limiting the potential harm identified by Mark Johnson. However the purpose of the equal-to-or-better-than test should not be to minimize the harm done to employees but rather to carry out the intended legislative purpose of providing protection for those employees.

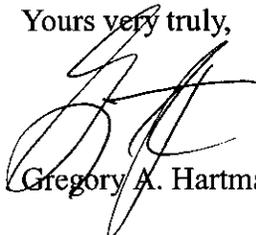
It may be that the approach taken by PERS staff is motivated by concerns that prospective joinder of the PERS system is the only legal option for exempt employers who fail the testing procedure. It is my clients' position that the statutes do not need to be read that narrowly and we will be prepared to address those fully once we have had input from the Attorney General.

Steve Rodeman
December 29, 2004
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Enclosed with this letter is proposed language which my clients suggest be considered in amending the rules in a way which will be most consistent with the legislative purpose. This language incorporates much of the staff's proposed amendments (shown as new language underlined and bolded and staff-proposed deletia italicized) with new language in a larger, non-serif font and deletia struck through with a horizontal line. As you can see the language provides that a failing exempt employer would be required to bring all employees into the system for all service performed after July 1, 1973 in the PERS system which existed at the time each employee commenced employment. We believe this to be consistent with the statute and the mechanism most consistent with carrying out the legislative purpose of protecting police officers and fire fighters throughout the state. We recognize that such an approach will cause economic hardship to some employers who will be compelled to join the PERS system for all service performed by their employees. While my clients are sympathetic to that position it should be remembered that exempt employers made the ongoing decision from 1973 forward to provide benefits under an exempt pension plan in lieu of joining PERS. An employer should have known that one of the consequences of that decision might ultimately be an order to join PERS to protect the rights of their individual police and fire employees if the exempt plan no longer provided that protection.

Under the testing mechanisms which have been used by the PERS board, an employer has always retained the option to amend their pension plan in order to meet the equal-to-or-better-than standards. My clients continue to support that option for exempt employers who do not initially pass the equal-to-or-better-than test. We don't think that any reasonable reading of the PERS statutes would compel a contrary result. This ability to amend the exempt plan will also mitigate any harshness in a rule which would require joining PERS for each employee's full career. Finally Mr. Johnson raised the possibility of performing the test on the basis of a hypothetical group of employees rather than an actual census for each exempt employer. My clients have remained neutral on that proposal until that concept could be more fully developed. However it appears, particularly based on the concerns expressed by Mr. Moreland, that employers have concerns about this hypothetical approach. The development of this hypothetical approach may be more likely to cause additional concerns and disruption than to lead toward the simplification of the process that Mr. Johnson envisioned.

Yours very truly,



Gregory A. Hartman

GAH:kaj

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238A). OPSRP consists of the individual account program (IAP) and pension program. If an employer fails the ETOB test:

a. Can employees who lose their present exemption join anything other than the OPSRP programs?

No. If the employer fails the ETOB test, the employer becomes a PERS-covered employer and the employees are entitled to membership in PERS as provided by law. Employers and employees joining PERS as a result of a determination by the Board that the employer does not meet the requirements of ORS 237.620 are precluded from joining the ORS chapter 238 plan and must join OPSRP.

b. If the answer to 2(a) is that the employees must join OPSRP if the employer loses its exemption under ORS 237.620, should the ETOB test be between the employer's current plan and what employees would receive if they were switched to OPSRP from the date the exemption ends?

Yes. We believe the benefit comparison should be between the benefits the employees would receive under the employer's plan and the benefits they would receive under ORS chapter 238A. The benefits under the two plans should be compared as of the same date.

c. The proposed rules state that an employer that fails an ETOB test joins PERS as of the next January 1. Is this permissible, or is an earlier start date required?

It may be, but this could provide a very short time for transition if the determination is made late in the year, or a relatively long time if the determination is made early in the year. ORS 237.620 does not prescribe the time between a determination that an employer does not meet ETOB requirements and when the employer must join PERS, but there is some indication in ORS 237.620 that the employees should become PERS members approximately six months after the Board's determination that the employer fails the ETOB test becomes final.

3. May employees of an employer that fails an ETOB test join the PERS chapter 238 plan retroactively to the employee's date of hire and receive service credit for time served under the prior plan? Similarly, if an employee joins a public employer after the PERS chapter 238 plan was closed to new employees, could that employee be enrolled in OPSRP with retirement credit back to the employee's date of hire?

No, in both cases. The employees may become members of PERS only in the manner prescribed by ORS chapters 238 and 238A. Nothing in those chapters or in ORS 237.620 authorizes any person who becomes a member of PERS as a result of the employer failing to meet ETOB requirements under ORS 237.620(4) to receive service credit in the manners suggested. However, the Board may wish to consider whether a different result would be possible if the employer's plan is integrated into PERS under ORS 238.680. If ORS 238.680 would permit this, the integration must occur before the Board determines under ORS 237.620 that the employer does not meet ETOB requirements.

DISCUSSION

Your questions require that we interpret ORS 237.620.² Our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). To do so, we first examine the text, which is the best evidence of legislative intent, and context of the statute at issue, which includes other provisions of the same statute and related statutes, including those enacted by the same legislature. *PGE*, 317 Or at 610-11; *Ragsdale v. Dept. of Rev.*, 312 Or 529, 536-37, 823 P2d 971 (1992). Context also includes prior versions of the statutes. *State ex rel Oregon Health Sciences University v. Haas*, 325 Or 492, 505 Or 492, 505, P2d 261 (1997). In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, including that common words are to be given their plain, ordinary meaning. *PGE* at 611. If the legislative intent is clear from the text and context of the statutes at issue, we look no further. If it is not clear, the second level of analysis is a consideration of legislative history. *Id.* If the intent of the legislature remains unclear after consideration of text, context and history, we resort to general maxims of construction, including a consideration of how the legislature would have intended the statute to apply if it had considered the issue. *Id.* at 612.

The ETOB test

ORS 237.620 was enacted in Oregon Laws 1971, chapter 692, section 3. It required all public employers of police officers and firefighters to become participants in PERS on or before July 1, 1973, unless the public employer “provides retirement benefits to its police officers and firefighters that are equal to or better than the benefits that would be provided to them under the system, as determined at the expense of the employer by the Public Employees Retirement

² ORS 237.620 provides:

(1) On or before July 1, 1973, all public employers of police officers and firefighters who are not participants in the Public Employees Retirement System shall become participants in the system with respect to the police officers and firefighters employed by them.

(2) All police officers and firefighters in the employ of the public employer on the date the public employer becomes a participant in the system under subsection (1) of this section shall establish membership under the six-month service requirement of ORS 238.015.

(3) The participation of the public employer in the system under this section shall apply to services of its employee police officers and firefighters on and after the effective date of the public employer’s participation in the system. The public employer also shall provide a prior service pension for its police officers and firefighters, within the limitations of ORS 238.225 (2) (1999 Edition), for continuous service to the public employer for a period not exceeding 20 years before the effective date of the public employer’s participation in the system.

(4) Notwithstanding subsections (1) and (2) of this section, if a public employer provides retirement benefits to its police officers and firefighters that are equal to or better than the benefits that would be provided to them under the system, as determined at the expense of the public employer by the Public Employees Retirement Board, the public employer is not required to participate in the system with respect to its police officers and firefighters. Once every two years the Public Employees Retirement Board shall review the benefits provided by a public employer that provides retirement benefits to its police officers and firefighters other than through the Public Employees Retirement System to determine whether the public employer complies with the requirements of this subsection.

Board.”³ The statute is silent regarding the procedures or analysis to be used by the Board in making this determination.

A public employer of police officers and firefighters may maintain a separate retirement system only if it provides benefits that are equal to or better than the benefits that would be provided under PERS. PERS offers a variety of benefits, including retirement and disability benefits, and retiree health insurance. The manner of comparing benefits available under the employer’s plan and under PERS must be determined by the Board. *Salem Firefighters Local 314 v. PERB*, 300 Or 663, 670-71, 717 P2d 126 (1986) (legislature did not impose a single actuarial formula but left to PERB to determine how to compare plans that do not have identical or directly comparable features).

Before it can determine how to compare benefits, the Board must first determine which benefits it may or must compare. The benefits available to PERS members differ depending upon whether membership was established before January 1, 1996, and whether the members were hired before, on or after August 29, 2003. *See* ORS 238.430 (establishing membership on or after January 1, 1996); ORS 238A.025(2), (4), ORS 238A.100 and ORS 238A.300 (employed on or after August 29, 2003). Persons employed on or after August 29, 2003, may become members of the Oregon Public Service Retirement Plan under ORS chapter 238A and cannot participate in or obtain benefits under ORS chapter 238. *See* ORS 238A.025(2). Consequently, the initial question is whether the Board may, or must, compare the benefits that would be available to the employees under the public employer’s plan with the benefits that would have been available to those employees if the employer had participated in PERS during that same period.

We considered a similar question after the legislature created what is known as Tier 2 benefits within ORS chapter 238, but before the creation of OPSRP. The question presented by PERS at that time was whether the creation of Tier 2 required a reexamination of exemptions under ORS 237.620 and whether Article XI, section 15, of the Oregon Constitution, which generally prohibits unfunded mandates to be imposed by the state on local governments, had any bearing on that. We concluded that the enactment of Tier 2 required PERS to reexamine local government exemptions under ORS 237.620 and that “the benefit comparison should be between the benefits of PERS members subject to Tier 2 and benefits of nonparticipating employers who became members of that employer’s retirement plan on or after the effective date of Tier 2.”⁴ Letter to Steve Delaney, PERS, from Assistant Attorneys General Robert W. Muir and Michelle

³ ORS 237.620 has been amended many times since 1971. Some of those amendments did not enact any change to the substance of the statute, but were done for the purpose of making it gender neutral or improving grammar. *E.g.*, Or Laws 1989, ch 888, § 2 (changed “firemen” to “firefighters”). As originally enacted, the cited passage provided: “provides retirement benefits to its police officers and firemen which are equal to or better than the benefits which would be provided to them under the system, as determined at the expense of the employer by the Public Employees Retirement Board at the expense of the public employer.” Substantive amendments to the statute that bear on your questions are addressed as necessary to respond to your questions.

⁴ Prior to the 2003 amendments to ORS 237.620, subsection (4) provided, in pertinent part: “This exemption shall continue to apply for only as long as the coverage remains substantially unchanged under ORS chapter 238 but must be reexamined whenever substantial changes are made therein.” Note that the term “exemption”, which appears in this now-deleted passage from ORS 237.620(4), does not appear anywhere else in that statute.

Teed dated March 12, 2001 (March 12, 2001, letter). However, we did not analyze the required comparison in depth because our focus was on whether the constitutional provision would preclude the comparison.⁵

The text of ORS 237.620 addresses this issue. Subsection (1) requires public employers of police officers and firefighters to join PERS unless they are exempt under subsection (4), and subsection (2) addresses when the employees become members of PERS. Subsection (3) addresses the extent of participation in PERS. It begins:

The participation of the public employer in the system under this section shall apply to services of its employee police officers and firefighters *on and after the effective date of the public employer's participation in the system.*

(Emphasis added.) This subsection also requires the public employer to provide a prior service pension to its employees “for a period not exceeding 20 years before the effective date of the public employer’s participation in the system.”

This indicates the legislature’s intent that participation in PERS under ORS 237.620 be prospective only. That is, the legislature provided that employers and employees becoming participants in PERS under ORS 237.620 are entitled to PERS benefits for the period beginning when the public employer begins to participate in the system, and that benefits for the period prior to the employer’s participation in PERS must be provided separately by the employer. The legislature’s decision to provide for PERS benefits only on and after the effective date of the employer’s participation in PERS necessarily excludes an interpretation of ORS 237.620 that would authorize PERS benefits to be paid for the period prior to when the employer began to participate in PERS. *See Waddill v. Anchor Hocking, Inc.*, 330 Or 376, 382, 8 P3d 200 (2000) (applying principle of *inclusio unius est exclusio alterius*). A police officer or firefighter joining PERS under ORS 237.620 may receive service credit under ORS chapter 238 for time employed by a public employer before that employer participates in PERS only by paying to the Board “an amount representing the contributions the member and the member’s employer would have made for years for which the member seeks retirement credit.” ORS 238.145(3)(b). Consequently, a police officer or firefighter who joins PERS as a result of the employer becoming a participant in PERS under ORS 237.620 is entitled to PERS benefits beginning from the date of membership, unless the member is authorized to purchase, and does purchase, prior service credit under ORS 238.145. The appropriate ETOB comparison, therefore, is between the benefits the employees would receive under PERS from the date of membership in PERS and the benefits available under the employer’s plan for the same period.

The next question is what PERS benefits are available to employees of an employer that fails the ETOB test. Any person joining PERS on or after August 29, 2003, including as a result

⁵ We concluded that it did not, because the mandate provided in ORS 237.620 preexisted adoption of Article XI, section 15 of the Oregon Constitution. *See Or Const Art XI, §15(7)(c)*. If the 2003 amendments to ORS 237.620 impose any new mandates on local governments, Article XI, section 15, does not apply because the 2003 amendments were enacted by votes of greater than three-fifths of both houses of the Legislative Assembly. *Or Const Art XI, § 15(7)(a)*.

of that employer becoming a PERS-participating employer on or after that date, must join under OPSRP and is not eligible for any benefits under ORS chapter 238. *See* ORS 238A.100 (pension program); 238A.300 (individual account program). *See also* ORS 238A.025(2), (4).

Consequently, the comparison that must be made is between the benefits that would be available to the employees under ORS chapter 238A from the date of membership in PERS and the benefits available under the employer's plan during that same period. If the benefits under the employer's plan are equal to or better than the benefits that would be available under OPSRP, then the employer is not required to join PERS. ORS 237.620(4).

Changes to employer's plan

As discussed above, it is up to the Board to determine the manner of comparing benefits available under the employer's plan and under PERS, including when the plans do not have identical or directly comparable features. The actuarial practices and other elements of comparing benefits are beyond the scope of your questions, but you do ask whether PERS may use a provisional test that would provide a public employer an opportunity to amend its plan in order to meet the ETOB test.

In *Springfield Firefighters' Assoc. v. PERB*, 93 Or App 134, 137, 760 P2d 1372, *rev den* 307 Or 245 (1988), the Court of Appeals upheld the Board's decision to consider changes to an employer's plan made while the ETOB case was pending before the Board. This establishes that the Board may consider any changes that are made to an employer's plan at any time up to when the Board makes a determination that the employer fails the ETOB test. The Board makes that determination when it issues a "final order." *See* ORS 183.310(6)(b).

Your question describes proposed OAR 459-030-0030 as providing for a provisional test to be administered before the final test that will be used to make the ETOB determination. The proposed rule presented to the Board at its November 19, 2004, meeting provides that "[a]ny order denying a petition for exemption will not be effective until at least 120 days after being issued. During that period, the public employer may amend its plan to comply retroactive to the valuation date or file a written request for an extension." Rather than provide for a provisional test, this language suggests only that the effective date of the Board's order will be delayed to provide the employer time to amend its plan.

ORS 237.620 does not prescribe any particular procedure to be used. Combine this with the holding of the Court of Appeals that the Board may consider any changes to an employer's plan that are made before the Board's final determination, and it is reasonably certain that the Board has broad discretion to adopt a procedure that may allow an employer to make changes to its plan as may be necessary to avoid a determination that the plan satisfies the ETOB test at any time before the Board issues its final order.

However, proposed OAR 459-030-0030 likely will not achieve this result. The draft rule provides for the Board to issue its determination with a delayed effective date. The issuance of the determination is the Board's "final order" despite the delayed effective date. *See* ATTORNEY GENERAL'S ADMINISTRATIVE LAW MANUAL (2004) at 149.

There may be other limits on procedures the Board may adopt. The 2003 legislature amended ORS 237.620(4) to require the Board to review “[o]nce every two years * * * the benefits provided by a public employer that provides benefits to its police officers and firefighters other than through the Public Employees Retirement System to determine whether the public employer complies with the requirements of this subsection.” Previously, reexamination was required only when substantial changes were made to the ORS chapter 238 plan. *See former* ORS 237.620(4) (quoted in footnote 4, above). This change in the text of ORS 237.620(4) creates a more defined time for review than was present under the former text. Now, a review must be done every two years regardless of changes to PERS. This indicates that the legislature intended the Board to make determinations about whether public employers of police officers and firefighters provide benefits that are equal to or better than the benefits available from PERS with that same frequency. This suggests that a procedure that causes or permits a delay in the determination by the Board to the point that the Board does not meet the requirement of determining whether a public employer complies with the requirements of ORS 237.620(4) creates a risk that the Board may not be in compliance with that statute.

It is not clear that such delays would result in noncompliance with ORS 237.620 or what the ramifications of such noncompliance might be. In addition, delays may occur that are beyond the Board’s control, including as a result of a suit for judicial review challenging the Board’s determination. However, if the Board adopts a procedure that may result in delays beyond what may be allowed by ORS 237.620(4), there is a potential risk to the Board if those delays result in benefits to police officers and firefighters being less than the benefits available from PERS for a period that is longer than would have resulted if the Board’s procedure did not result in such delays. The requirement now in ORS 237.620(4) that the Board review benefits once every two years, likely means that the Board must make a determination every two years, not merely commence a process every two years that may lead to a determination at some indefinite time.

We recommend that the Board consider whether its process should provide for determinations to be made by the Board once every two years and the potential risks that may result if the procedure it adopts creates the possibility of delays that may prevent this from occurring.⁶ In any event, the Board may adopt a procedure that would provide opportunities for

⁶ The proposed rules presented to the Board at its November 19, 2004, meeting provides that the Board’s determination will not become final until all remedies have been exhausted. As discussed above, the Board’s determination is a “final order” under ORS 183.310(6)(b). I understand the intent of this portion of the rule to be that a final order issued by the Board determining that a public employer fails the ETOB test will be stayed by operation of the rule until the time for filing for reconsideration or for judicial review of the final order is passed and no petitions for reconsideration or judicial review have been filed, or if such petitions have been filed, that they have been fully adjudicated no further review is available. In the event a suit for judicial review of the Board’s order is filed, that review likely will delay the effective date of the Board’s “determination” beyond the two year period contemplated by ORS 237.620(4). Moreover, there is some doubt that the Board may provide for stays of these orders in this manner, for a couple of reasons. First, if the Board will make its determinations in a contested case, its authority to stay the order governed by ORS 183.482(3)(b). It provides that the Board may stay an order upon a filing of a petition for judicial review if there is a showing of irreparable harm to the petitioner and a colorable claim of error in the order, unless substantial public harm would result from granting the stay. The proposed rule is inconsistent with this statute, because it would not require this showing in each case. Second, if the Board will make

a public employer to modify its plan at any time prior to the Board's issuance of its determination.

Effective date of Board's determination; effective date of membership in PERS upon a determination that employer fails an ETOB test

ORS 237.620(4) requires the Board "to determine whether the public employer complies with the requirements of this subsection." Such a determination is made by a final order under the APA. Question 2.c, asks when the public employer's participation in PERS must start if the Board determines that the employer fails the ETOB test.

We addressed a similar question under the former version of ORS 237.620(4). We concluded that the most likely answer was that "the date the exemption ceases is the latter of (a) the date of the substantial changes in PERS coverage or (b) the date that benefits under the exempted plan ceased to be equal to or better than benefits under PERS." March 12, 2001, letter at 6. We rejected the possibility that employers' plans remained exempt "until there is a study and a board finding that benefits under the exempted plans are no longer equal to or better than the benefits under PERS" because such a conclusion was "not consistent with the text of ORS 237.620(4), which plainly states that the 'exemption shall continue to apply for only as long as the coverage remains substantially unchanged under ORS chapter 238.'" March 12, 2001, letter at 6.

The 2003 amendments to ORS 237.620 reverses our prior analysis. Those amendments deleted the language indicating the date that the exemption ceases and replaced it with a requirement that the Board review the benefits provided by public employers once every two years. At the first level of analysis under *PGE v. BOLI*, which includes consideration of former versions of the same statute, we conclude that the deletion of language regarding when the exemption ceases means that the exemption ceases at a different time than under *former ORS 237.620*. As amended, however, the text of ORS 237.620(4) now is silent as to when the exemption ceases and when a determination by the Board that an employer's plan that does not comply with the requirements of that subsection becomes effective.

We turn to a review of other portions of ORS 237.620 and related statutes. Both subsections (1) and (2) provide some indication of legislative intent regarding when public employers must join PERS. Subsection (1) provides for employers of police officers and firefighters, unless exempt under subsection (4), to become PERS-participating employers on or before July 1, 1973. Because this was enacted by the 1971 legislature, Or Laws 1971, ch 692, §3, this shows that the legislature recognized some time was required between the time the legislature determined such employers would be required to become PERS-participating employers and when that participation must begin.

. . . *continued*

its determinations by issuing orders outside of a contested case process, I am not aware of any statute conferring authority on the Board, or any other agency, to stay such orders. See ORS 183.484(4) (authorizing agency to withdraw, but not stay, orders in other than contested cases). See also ORS 19.330 (filing of notice of appeal does not automatically stay judgment).

Subsection (2) demonstrates that the legislature did not intend for the employees to be PERS members immediately upon their employer failing an ETOB test. As originally enacted in 1971, subsection (2) provided that the employees would become members of PERS as of the date the public employer began participating in PERS and only new employees would have to serve six months before becoming new members. Or Laws 1971, ch 692, §3(2). The legislature amended subsection (2) in Oregon Laws 1973, chapter 704, section 16, into its present form (at that time it cited ORS 237.011, which was renumbered ORS 238.015 in 1995), providing that employees joining PERS under ORS 237.620(1) had to establish membership under the six-month service requirement of ORS 238.015. That amendment was effective July 1, 1973, the same day that employers were required to join PERS under ORS 237.620(1) unless they were exempt under subsection (4). Or Laws 1973, ch. 704, § 19. Thus, except for any employer that joined PERS under ORS 237.620(1) before July 1, 1973, ORS 237.620 has always provided for a lag between the date of a determination by the Board that an employer fails the ETOB test and when the employees may become members of PERS.

This, together with the 2003 legislature's deletion of language in ORS 237.620(4) suggesting that the employer's participation in PERS would begin as of the date the employer's plan no longer provided benefits equal to or better than the PERS benefits, indicates that the legislature generally did not intend the requirement that a public employer and its employees become members of PERS to apply immediately upon a determination the employer failed the ETOB test. But it does not shed any light on when the employer must begin to participate in PERS. Nor are we aware of any other statute or anything in the legislative history of ORS 237.620 that addresses this issue.

Consequently, we proceed to the third level of analysis. At that level we apply maxims of construction to attempt to discern the legislature's intent. They include attempting to determine how the legislature would have intended the statute to apply if it had considered the issue. *PGE*, 317 Or at 612, and that the statute must be interpreted consistent with its purpose. *Bartz v. State of Oregon*, 314 Or 353, 358, 839 P2d 217 (1992).

Although the original version of ORS 237.620(2) provided for employees of public employers joining PERS under ORS 237.620(1) to become PERS members immediately when the employer began to participate in PERS, since July 1, 1973, the statute has not provided for any employee to become a PERS member immediately upon the employer failing an ETOB test. Accordingly, we believe that if the legislature had considered when an employer failing the ETOB test that is performed once every two years as required by the 2003 amendments to ORS 237.620(4) must begin participating in PERS, it would have established a time that would have included a delay of at least six months before the employees may become PERS members.

The proposed rules submitted to the Board at its November 19, 2004, meeting, provide that a public employer failing the ETOB test must join PERS (more particularly, OPSRP), on

January 1 of the year after the Board's determination becomes final.⁷ You ask whether this is permissible.

Because the statute does not prescribe when the employer must join PERS, and because we believe the legislature would have provided some lead time between the Board's determination and when the public employer must begin participating in PERS, this proposal may be within the time required by the statute. However, because the statute is silent on this point, we cannot say with certainty that this is the case.

There is a possibility that a court could conclude that this rule does not comport with the statute, at least in circumstances where the Board's determination becomes final early in a calendar year. And in circumstances where the Board's determination becomes final late in a calendar year, a requirement that the employer join PERS on January 1 of the next year may create practical problems for both the employer and PERS. You may wish to consider an approach that would require the public employer to join PERS at some interval following the date on which the Board's determination becomes final regardless of the time of year when that happens. While we cannot say with certainty what that interval may be, we think that an approach that enables the employees to qualify for membership in PERS approximately six months after the Board's determination would comport with the legislature's intent.

Service credit for employees joining PERS when employer fails ETOB test

As discussed above, employees of an employer that fails the ETOB test must join the OPSRP portion of PERS. Accordingly, the employees cannot join the ORS chapter 238 portion of PERS. Prior to enactment of OPSRP, employees joining PERS as a result of their employer failing the ETOB test joined under ORS chapter 238 and were able to purchase service credit under ORS 238.145.

The authority to purchase service credit under ORS 238.145 applies only to police officers and firefighters who participate in the ORS chapter 238 portion of PERS. *See* ORS 238A.050(2) (listing portions of ORS chapter 238 applicable to OPSRP, ORS 238.145 not included). The legislature demonstrated in ORS 238.145 that it knows how to provide for police officers and fire fighters to obtain prior service credit when they become PERS members as a result of their employer failing an ETOB test. The legislature did not provide similar authority in the 2003 Act that included the amendment to ORS 237.620 or in Oregon Laws 2003, chapter 733, which created OPSRP. Because we are precluded from inserting what the legislature omitted, ORS 174.010, we conclude that the legislature did not intend for police officers and firefighters to be able to purchase prior service credit when they join PERS as a result of their employer failing an ETOB test after the effective date of the act creating OPSRP.

⁷ As discussed in footnote 6, above, we believe the Board's determination becomes final when it makes its determination, unless the final order making that determination is stayed pursuant to ORS 183.484(3)(b).

DRAFT

A possible alternative

The failure of an employer's plan to pass an ETOB test is not the only way for the employer and its police officer and firefighter employees to join PERS. ORS 238.680 authorizes integration of a previously established retirement system into PERS upon application to the Board by two thirds of the employees and their employer. Because it is beyond the scope of your questions, I have not analyzed whether the Board may provide for employees of a plan that is integrated into PERS under ORS 238.680 after August 29, 2003, to become members of the ORS chapter 238 portion of PERS. However, if the Board has that authority, upon a determination by PERS that an employer fails the ETOB test, that integration must occur before the Board determines that the employer fails the ETOB test. That is because ORS 238.680(1) provides that integration is available to "[e]mployees whose membership in a previously established retirement system excludes them from membership in the system established by this chapter," that is, ORS chapter 238. If an employer fails an ETOB test, the employees are not precluded from membership in PERS. Consequently, if the Board has authority under ORS 238.680 to provide for members of an integrated plan to participate in the ORS chapter 238 portion of PERS, that integration must occur before PERS makes a determination that the employer's plan fails the ETOB test. If that happens, the employees may purchase service credit under ORS 238.145.

Sincerely,

DRAFT

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503 842-3418

January 11, 2005

Steve Rodeman
Public Employee Retirement System
P O Box 23700
Tigard, OR 97281-3700

Re. ETOB Proposed Rules.

Dear Rodeman:

After reading Mr. Hartman's proposal and the draft from the Department of Justice, as the Plan Administrator for the Tillamook County Employee Retirement Plan, I think it is time we made comment. My statement is not directed solely at the legal issues before us, but a step back and a look at the global issue that has brought us to this point and is not being discussed. We are discussing ETOB because the legislature was put into a position to create an OPSRP instead of remaining with the PERS plan (Tier I & II) because of the failure of the plan to be financially sustainable.

The previous PERB placed earnings in excess of historical averages in the accounts of members rather than first insuring the continued health of the trust that funds the plan. Those members represented by Mr. Hartman want to use the argument that the ETOB testing should somehow be designed to accentuate the money match created by the short term outlook of the previous PERB. In his letter he recognizes that the PERS trust had "over a decade of excellent investment returns" as if those returns were just a matter of picking the right investments and not a function of an unsustainable growth in the equities market that could and can not be duplicated over a long period of time. A retirement plan such as PERS or any ETOB plan must be designed, guarded and administered for perpetuity. And "over a decade" may not in any fashion be considered a representative sample of financial investing in perpetuity.

What was generated by a short term point of view is a series of decisions that busted the ability to pay for the funding of PERS. If more thought and care had been behind the historical perspective we would all be still working under a Tier I plan design. I have been in meetings in the past where it was agreed by the PERB that the only decision that the Board could legally make was to give the members as much as possible. Unfortunately, for all the public employees hired since 1996, and 2003, they must receive a lesser plan because of a limited perspective on what constitutes what was best for members at any particular point in time.

By creating OPSRP, large strides were made by PERB and the Legislature in making an ongoing employee retirement plan possible without bankrupting local governments and districts. However, from an actuarial perspective the funding system for PERS is not out of the woods. PERS uses acceptable, yet historically rich assumptions regarding the analysis of future earnings and funding. Over perpetuity they may prove to be workable, but for the short term (next decade or two) several issues exist that may make for a financially difficult future. Factors effecting PERS near term are an assumption of an 8.5% earning growth rate, a 4% wage growth rate, and the large baby boomer group of soon to be retirees. Some of the assumptions made make the future look better than what may become reality. We all know by experience how risky equity markets can be in the short term.

How this all relates to the ETOB testing is the current PERS Board needs to look at ETOB testing beyond the last two decades. Not design a test that, as Mr. Hartman suggests, "provides at least 100% of the benefits provided by PERS" with its skewed results from the 1990's that broke the system in the first place. The penalty is not to PERS or ETOB Plans, but the public employees that must now work under a reduced benefit plan in order for State and local governments to pay for its past decisions along the lines that Mr. Hartman proposes.

Tillamook County supports the draft provided by the Department of Justice. It is legitimately aware of the problems that forced the Legislature to enact the changes in ORS 237, and goes to the intent of their wish to provide a sustainable and equitable retirement plan for all police and fire employees of Oregon.

Sincerely,

Craig Schwinck
HR/IS Director
Tillamook County, Oregon

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

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January 13, 2005

BY EMAIL AND FIRST CLASS MAIL

Steve Rodeman
Public Employee Retirement System
PO Box 23700
Tigard, OR 97281-3700

Re: ETOB Proposed Rules OAR 459-030-0000 et seq.
Our File No.: 9431-01

Dear Steve:

I have had the opportunity to review Keith Kutler's draft of January 6, 2005 regarding equal-to-or-better-than questions. First I want to thank both you and Keith for making this opinion available to stakeholders in sufficient time that we can make comments prior to our scheduled meeting and in advance of board action. I have two fundamental differences with the DOJ analysis, each of which will be addressed in turn.

Effective Date of Participation

The equal-to-or-better-than statute, ORS 237.620(1), is absolute in its terms requiring all public employers who employ fire fighters and policemen to participate in PERS effective on or before July 1, 1973. There should be no doubt that when the initial equal-to-or-better-than test was performed that the legislature required any non-exempt employer to begin participation on July 1, 1973. There is also no question that the legislature intended that testing be done from time to time as the original statute required retesting when there was a change in PERS benefits. The question then is whether an employer who fails a later test is also required to join the system effective July 1, 1973. Mr. Kutler rejects this view, relying solely on ORS 237.620(3) which as passed by the 1971 legislature read as follows:

“The participation of the public employer in the system under this section shall apply only to services of its employee police officers and firemen on or after the effective date of the public employer's participation in the system. However, if it desires to do so the public

Steve Rodeman
January 13, 2005
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employer may elect to provide a prior service pension for its police officers and firemen within the limitations of subsection (2) of ORS 237.081.”

The 1975 legislature made the provision of prior service credit mandatory (Or Laws 1975 Ch 449 § 13) and this section of the statute has remained unchanged from that time.

The DOJ analysis fails to follow one of the fundamental rules of statutory construction by failing to consider the meaning of each word in the statute. Interpretation should neither add words which are not part of the statutory language nor delete words which are.

In order to understand the purpose of this subsection it is necessary to review the meaning of the term “prior service credit” which is a concept which has largely disappeared from the PERS system. At the inception of PERS in 1945 the legislature provided that state employees who commenced participation in the system at its inception were to receive up to 20 years of prior service credit for service to the state prior to the inception of PERS. OCLA 90-715. For each of those years of prior service credit an employee was to be paid \$2.50 per month per year of service. As is currently the case local employers were not required to join PERS, but if they chose to do so they were permitted though not required to extend prior service credits to their employees. OCLA 90-715. These original PERS statutes also permitted local employers to integrate existing systems into PERS on a voluntary basis (OCLA 90-703), and further provided that upon integration an employer could pay past service to their employees as calculated on an actuarial basis. In other words an integrating employer could use the funds in their existing pension plan to purchase credit under PERS which may or may not equal the years of service that their employees had performed under the integrating pension plan. Thus at the inception of the PERS system prior service credit referred to a fixed amount for a fixed number of years which was awarded to a participant upon their original participation in the system, while past service credit was a concept associated with integrating employers which permitted the purchase of past service credit on an actuarial basis.

At the time of the passage of the original equal-to-or-better-than statute in 1971 those statutes had essentially remained unchanged, though the amount of prior service credit had increased to the sum of \$6 per month per year of service for certain retirees. ORS 237.081. By using the term “effective date” the 1971 legislature drew a dividing line between credit for service under the PERS plan and prior service credit for service prior to that effective date. The DOJ reading of the statute results in a floating effective date with presumably a new effective date set as a result of each PERS-administered ETOB test. The problem with that reading is that it makes very little sense. According to the DOJ’s reading of the statute a non-PERS employer who is now required to join PERS as a result of failing an ETOB test would be required to provide prior service credit for up to 20 years prior to that date of participation. Not only would such a requirement seem to make very little sense at the current time, it would have made very little sense in 1971. Commencing on July 1, 1973 the statute required

Steve Rodeman
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employers to either join PERS or provide an equal-to-or-better-than plan. If it had been the intention of the 1971 legislature to allow the effective date of participation to float, as stated by the DOJ's analysis, then the legislature would have fixed the prior service credit date on July 1, 1973. Otherwise an employer who failed an ETOB test would be required to provide an equal-to-or-better-than pension plan for post-1973 service, but also a prior service credit for that same period of time. If it was the intention of the legislature to fix the effective date on July 1, 1973, a seamless system is created with prior service credit a pre-1973 requirement and equal-to-or-better-than a post-1973 requirement. The best reading of ORS 237.610(3) is that the legislature meant the effective date to remain fixed on July 1, 1973, which is the only date mentioned in the statutory scheme and the only date consistent with the overall statutory scheme. It should be clear from the context of the statute that the legislature meant to fix the effective date of participation on July 1, 1973 and that should an employer fail the equal-to-or-better-than test currently being devised, they would be required to join the system effective July 1, 1973.

Participation in OPSRP

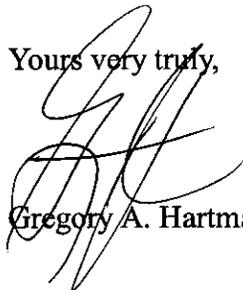
The DOJ opinion concludes based on a reading of ORS 238A.025(2) that participation in PERS for any employer who does not pass the equal-to-or-better-than examination must be participation only in the Oregon Public Service Retirement Plan. However, the statutes by their own terms are not applicable to the requirements of the equal-to-or-better-than test under ORS 237.620. The statute is clearly meant to create a dividing line so that those who either commenced their employment after August 29, 2003 or suffer a break in service will receive their benefits under OPSRP while pre-August 29, 2003 participants continue to receive benefits under ORS Ch. 238. However, there is nothing in the statute which impacts the application of the equal-to-or-better-than test which appears in Chapter 237. If the legislature had meant to restrict the application of the equal-to-or-better-than examination to participation in OPSRP they could have done so.

In previous correspondence and in testimony before the board I have stated what I believe to be the appropriate approach to the board's formulation of the equal-to-or-better-than process. The job of understanding and implementing the legislative purpose of the underlying statute is for the board. Once that policy has been stated the most appropriate question to address to the Attorney General is can that policy be carried forward through the formulation of an equal-to-or-better-than examination which is consistent with statutory requirements and limitations. While I am certain that Mr. Kutler has given what he believes to be his best reading of the statutes, that legal analysis is not enough in this circumstance. Ambiguous statutes by their very nature are susceptible to more than one potential interpretation. The better question is which of perhaps several interpretations of this language is most consistent with what the board believes to be the underlying legislative policy. I would once again encourage the board to articulate what they believe to be the underlying legislative policy of these statutes and then to challenge Mr. Kutler with the more appropriate question of whether there are

Steve Rodeman
January 13, 2005
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potential acceptable interpretations of this statute, one of which would be most consistent with carrying out that underlying legislative policy.

Yours very truly,

A handwritten signature in black ink, appearing to read 'GAH', is written over the typed name 'Gregory A. Hartman'.

Gregory A. Hartman

GAH:kaj

G:\Hartman\PFPA-PPA 9431\01 Equal-To\Rodeman 05-01-13.wpd



MEMORANDUM

TO: David Martin (to David.Martin@state.or.us)
cc: Ardis Belknap, Benefits Manager, City of Springfield (to
abelknap@ci.springfield.or.us)
Maria Keltner, Attorney, LGPI (to mkeltner_lgpi@orlocalgov.org)
Greg Hartman (to hartmang@bennethartman.com and by fax to 503 248
6800)

FROM: Everett Moreland

DATE: January 18, 2005

RE: Proposed ETOB rules

The City of Springfield submits the following comments on two conclusions in Keith Kutler's January 6, 2005, draft opinion letter to Steve Rodeman.

Whether public safety employees in a local plan that fails ETOB may become pension members under PERS chapter 238

Mr. Kutler concludes that public safety employees in a local plan that fails ETOB may only become pension members of OPSRP. He cites ORS 238A.100, 238A.300, and 238A.025(2) and (4).

Whether ORS 238A.025 applies

Greg Hartman's January 13, 2005, letter commenting on this conclusion states that ORS 238A.025 does not apply to determine whether a public safety employee in a local plan that fails ETOB may become a pension member under PERS chapter 238 (a "chapter 238 pension member"). The problem with this approach is that, if ORS 238A.025 and the rest of ORS chapter 238A and H.B. 2020 do not apply to determine whether such a public safety employee may become a chapter 238 pension member, there is no standard at all for this purpose. The normal rules of statutory construction require that the ETOB statutes be understood in the context of the statutes for PERS chapter 238 and OPSRP, which include ORS 238A.025 and the other provisions determining whether an employee may become a chapter 238 pension member.

Interpreting ORS 238A.025

ORS 238A.025 and 2003 Oregon Laws chapter 733, section 2a (at the Note following ORS 238A.025) make clear that after a break in service¹ a chapter 238 pension member may not again become an active chapter 238 pension member. They also make clear that an employee hired after August 28, 2003, with no prior public service may not become a chapter 238 pension member. They could be clearer on the status of an employee who has worked for the employer continuously since, say, 1995 without becoming a chapter 238 pension member ("1995 employee"). This 1995 employee's status depends on the meaning of ORS 238A.025(2) and (4)(b), which state:

"(2) Notwithstanding any provision of ORS chapter 238, any person who is employed by a participating public employer on or after August 29, 2003, and who has not established membership in the Public Employees Retirement System before August 29, 2003, is entitled to receive only the benefits provided under the Oregon Public Service Retirement Plan for periods of service with participating public employers on and after August 29, 2003, and has no right or claim to any benefit under ORS chapter 238 except as specifically provided by this chapter.

"* * * *

"(4) A person establishes membership in the system before August 29, 2003, for the purposes of this section if:

"* * * *

"(b) The person performed any period of service for a participating public employer before August 29, 2003, that is credited to the six-month period of employment required of an employee under ORS 238.015 before an employee may become a member of the system."

¹With some exceptions, a break in service consists of performing "no service with a participating public employer in a qualifying position for a period of six consecutive months." ORS 238A.025(3)(b). A qualifying position excludes "service in a job for which benefits are not provided under the Oregon Public Service Retirement Plan pursuant to ORS 238A.070(2)," ORS 238A.005(14), and so excludes service as a public safety employee participating in a local plan rather than in PERS chapter 238 or OPSRP. See ORS 238A.070(2), which states:

"Any participating public employer that provided retirement benefits under ORS chapter 238 for some but not all of the employees of the participating public employer on August 28, 2003, need not provide benefits under the Oregon Public Service Retirement Plan for any class of employees who were not members of the system on August 28, 2003."

The uncertainty of PERS staff about how to apply ORS 238A.025(2) and (4)(b) to this 1995 employee is reflected in the following OAR 459-075-0010(1), which avoids addressing this 1995 employee's status:

"(1) Eligibility. An employee is eligible to become a member and receive benefits under the OPSRP pension program, and ineligible to become (or remain) a member of PERS or accrue benefits under PERS, if the employee:

"(a) Begins employment in a qualifying position with a participating public employer on or after August 29, 2003;

"(b) Was not a member of PERS before August 29, 2003; and

"(c) Did not perform any period of service before August 29, 2003, that is credited to the six-month period required under ORS 238.015 for membership in PERS; or

"(d) Was an active or inactive member of PERS on August 28, 2003, and incurs a break in service."

For the following reasons the City of Springfield believes that ORS 238A.025(2) and (4)(b) prevent this 1995 employee from becoming a chapter 238 pension member:

- It is unlikely the Legislature intended to:
 - Bar an employee employed since 1995 who is a chapter 238 pension member from again becoming an active chapter 238 pension member after a break in service; but
 - Allow an employee employed since 1995 who on January 1, 2005, has not become a chapter 238 pension member to thereafter become an active chapter 238 pension member.²

Such a distinction favoring the employee who has not become a chapter 238 pension member over the employee who has (did the Legislature intend to punish chapter 238 pension members for PERS funding problems?) might violate the privileges and immunities section of Oregon's constitution³ and, even if it does not, would produce a nonsensical result that should be avoided if the statute can be given a more sensible interpretation.

²This 1995 employee has also had, by definition, a break in service. See note 1.

³Article I, Section 20: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

- This nonsensical and possibly unconstitutional result can be avoided by:
 - Interpreting "any person who is employed by a participating public employer on or after August 29, 2003" in ORS 238A.025(2) as applying to persons employed before that date whose employment continues to that date, as well as to persons hired on or after that date; and
 - Interpreting "that is credited" in ORS 238A.025(4)(b) to refer to the most recent six-month period of employment, and thus not treating a person as having established "membership in the system before August 29, 2003" if the most recent six-month period includes no day before that date.

This approach is consistent with the break-in-service rule applied to chapter 238 pension members.

Whether public safety employees in a local plan that fails ETOB are to be provided retirement credit under PERS chapter 238 or OPSRP retroactive to six months after their hire date

Comment on Mr. Kutler's conclusion

Mr. Kutler concludes that public safety employees in a local plan that fails ETOB may not receive retroactive benefits under PERS chapter 238 or OPSRP. He cites ORS 237.620(3), which states:

"The participation of the public employer in the system under this section shall apply to services of its employee police officers and firefighters on and after the effective date of the public employer's participation in the system. The public employer also shall provide a prior service pension for its police officers and firefighters, within the limitations of ORS 238.225 (2) (1999 Edition), for continuous service to the public employer for a period not exceeding 20 years before the effective date of the public employer's participation in the system." (Emphasis added.)

Mr. Hartman's January 13, 2005, letter commenting on this conclusion states that "the effective date" as used in ORS 237.620(3) refers to July 1, 1973. As evidence for this he states that the requirement in ORS 237.620(3) to provide a prior service pension makes no sense unless the prior service pension is limited to periods before July 1, 1973, because providing a prior service pension for periods on and after July 1, 1973, would result in a prior service pension for up to 20 years of the same period for which the employer provides retirement benefits under the local plan.

The reason it at one time made sense⁴ to require an employer to provide a prior service pension for up to 20 years of the same period for which the employer provides retirement benefits under the local plan, is the following provisions giving PERS chapter 238 benefits for prior service credit:

ORS 238.125--10 years of credited service and prior service credit to buy retirement credit for the six-month waiting period

ORS 238.260(14)(a)(C)--25 years of credited service and prior service credit to transfer the variable account to the regular account before retirement

ORS 238.280(2)(a)--age 50 and 25 years of credited service and prior service credit for a public safety employee to retire early without actuarial reduction

ORS 238.280(2)(b)--30 years of credited service and prior service credit for an employee to retire early without actuarial reduction

ORS 238.320(3) and (6)--10 years of credited service and prior service credit for a non-service connected disability retirement allowance

ORS 238.385(4) and 123.387(1)--10 years of credited service and prior service credit to receive a tax remedy of from 1% to 4%

Comment that PERB should not reconsider this question

PERB has already decided that public safety employees in a local plan that fails ETOB may not receive retroactive benefits under PERS chapter 238. For the reasons stated on pages 1-3 of the City of Springfield's December 8, 2004, comments on the proposed ETOB rules, the City believes PERB should not reconsider that decision.

⁴I say "at one time made sense" because the City of Springfield believes that ORS 237.620(3) should be interpreted as not requiring a prior service pension for a public safety employee who becomes an OPSRP pension member as a result of a local plan failing ETOB.

From: RODEMAN Steven P
Sent: Friday, January 14, 2005 5:07 PM
To: Kutler Keith
Cc: HARRIS James; MARTIN David; WILSON Brendalee
Subject: ETOB Question Supplement

At the advisory committee meeting today, some members of the committee wanted to make sure we asked you in the broadest of terms whether an employer who fails the ETOB test has any option other than to have their employees join OPSRP on a prospective basis.

Attached to this message is Greg Hartman's letter commenting on your discussion draft. Assuming Greg's premises to be true about the PERS Board having the option to elect, as a policy choice, to enroll employees of employers who failed the ETOB test into any of the PERS plans, and assuming the Board so elected, can you find any statutory support for the Board being able to put that policy into practice? Does that support allowing them to enroll currently into other plans also allow retroactively granting them credit for previous service time as if the employee had been in their respective PERS plan since the employee began working?

David, please circulate this inquiry to the advisory committee members. Keith, if you have any questions about the scope of this inquiry, please let me know. Thanks for your continued consideration.

>>> **"Kutler Keith" <keith.kutler@doj.state.or.us> Monday, January 31, 2005 >>>**
Steve, here are my thoughts on the issues you raise below and on Greg Hartman's letter.

First, the options that may be available to an employer who fails the ETOB test are discussed in my draft letter. Before the Board makes its determination, the employer has a couple of options. First, the employer may amend its plan, and the Board may consider the amendments when applying the ETOB test. Second, the employer and its employees may pursue integration under ORS 238.680. As noted in the letter, I have not analyzed whether that statute would allow the employer to join the ORS chapter 238 plan. Once the Board makes its final determination that the employer fails the ETOB test, integration is no longer available.

On the second point you raise in your email, you ask that I assume that the Board has policy discretion to elect to enroll employees of employers failing the ETOB test into any PERS plan. I am unable to make this assumption. The options available to the Board are circumscribed by statute. ORS chapter 238A requires new employers and employees joining PERS to join under that chapter. I am not aware of any exception for employers and employees joining as a result of the employer failing an ETOB test.

This provides a good segue to addressing points raised by Greg in his letter. He makes two points. First, he argues that ORS 237.620 sets 7/1/73 as the date by which an employer failing the ETOB test must join PERS. If he is correct, perhaps that would support his contention that the employers and employees at least should have the option to join under ORS chapter 238; indeed, it might even compel that conclusion because if the legislature had intended that the employees of a failing employer somehow be put in the same position they would have been in had the employer been in PERS from that date, this would be the only way to accomplish that goal.

But that is not what the legislature intended. If that is what it had intended, it would have said that all employers failing under ORS 237.620(4) must join PERS as of 7/1/73. ORS 237.620(3)

provides that the employer's participation is effective "on and after the effective date of the public employer's participation in the system." It does not say "on and after 7/1/73."

There are several other indications that the legislature did not intend employers failing ETOB tests and their employees to join the system as of 7/1/73. First, a requirement that employers failing an ETOB test and their employees join PERS as of 7/1/73 does not account for employers who came into existence or otherwise established a retirement plan after that date. The only way for Greg's analysis to accommodate such employers would be to say that ORS 237.620 means they must join 7/1/73 or such later date as the employer came into existence or created a plan. There is no textual support for that.

Second, the only basis on which an employer subject to ETOB was permitted not to join PERS on 7/1/73 was if the employer's plan was ETOB the PERS plan. Consequently, if the employer's plan is later found to fail ETOB, that does not undo the fact that it was ETOB as of 7/1/73. The determination that the employer's plan fails the ETOB test is made as of the date of that determination. It is not a retroactive determination.

Third, before OPSRP existed, the only provision made in chapter 238 for employees joining PERS after their employer failed an ETOB test was for purchasing service credit. The legislature would not have had to create this authority for those employees to purchase service credit if ORS 237.620 authorized the employer and employees to join PERS as of 7/1/73, or any other date prior to the ETOB determination.

Fourth, there is nothing in ORS 237.620 that speaks to incorporating the employers' plan as it existed up to the date the employer joins PERS into the PERS system. This is in contrast to ORS 238.680, the integration statute, which does address those kinds of issues. Under maxims of construction applied under PGE and by Greg -- can't insert what has been omitted -- the legislature's choice to provide for that type of integration in ORS 238.680 but to omit it from ORS 237.620 demonstrates that ORS 237.620 was not intended to provide for integration of the employer's plan prior to participation in PERS after failing the ETOB test.

Moreover, if the Board had authority to allow an employer failing an ETOB test to join as of 7/1/73, a decision to do so likely would create enormous practical problems. For example, would the plan have to be made ETOB as of 7/1/73 for all employees, active and inactive and retired and deceased, who participated in the employer's system since that date? If the answer is yes, I cannot envision how that could be accomplished. If the answer is no, that would mean that the employer and employees in fact do not become part of PERS as of 7/1/73. And while practical concerns do not drive the legal analysis, the existence of these concerns supports the conclusion that the statute does not work this way.

Greg also relies on the provision in subsection (3) that makes the provision of prior service credit mandatory. But it requires provision of prior service credit by the employer, not by PERS. As he points out, the legislature made that mandatory in 1975. It was permissive in the 1971 version of the statute. This seems to suggest a couple of things. First, for employers coming into PERS under ORS 237.620 before the effective date of the 1975 amendment, the legislature required only that the employees be covered by PERS. Combine this with the language in the same subsection that the employers' participation is effective on and after the effective date of the employers' participation in PERS, and it appears the legislature was concerned only with what happened once the employer joined PERS. It is possible that some employers did not have a prior pension plan. Although I do not know that as a matter of fact, it would explain why the initial police and fire employers were not required to provide any pension for any period of employment before the employer joined PERS. Second, by the time 1975 came around, the only way an employer could join PERS under ORS 237.620 was upon failure of an ETOB test. This meant

that every employer joining PERS under ORS 237.620 from that date on necessarily had a pension plan. The 1975 amendment to subsection (3) forbade the employers from simply discontinuing their prior plans, and instead requires them to provide a benefit based on those prior plans. The benefit is a pension within the limits of (now) ORS 238.225(2) (1999) for continuous service not exceeding 20 years. Thus, if an employer initiated its own system in 1973 in order to pass the ETOB test, but the employer failed the test thereafter, ORS 237.620(3) requires the employer to provide a pension for the plan the employer had that was ETOB up until the determination of failure. As applied today, the employer is only required by subsection (3) to provide that prior pension for up to 20 years of service. It is likely, however, that other law will apply to require the employer to maintain its prior plan and pay benefits under it.

Greg's second point is that "if the legislature had meant to restrict the application of the ETOB examination to participation in OPSRP they could have done so." I think that is exactly what the legislature did. ORS 237.620 requires a comparison between the employers' plan and what would be available to the employees from PERS "on and after the effective date of the employer's participation in the system." Each time the legislature has changed PERS, by creation of Tier Two in 1996 and OPSRP in 2003, it changed the nature of the comparison.

I look forward to discussing these issues at the meeting on Wednesday.

Keith



Oregon

Theodore R. Kulongoski, Governor

February 7, 2005

MEETING	2-18-05
DATE	
AGENDA	C.4.
ITEM	Membership Eligibility (600 Hours)

(503) 598-7377
TTY (503) 603-7766
www.pers.state.or.us

TO: Members of the PERS Board
Key Reviewer: Brenda Rocklin

FROM: Steven Patrick Rodeman, Administrator, PPLAG

SUBJECT: Adoption of OAR 459-010-0003, *PERS Membership Eligibility*

OVERVIEW

- **Action:** Adopt OAR 459-010-0003.
- **Reason:** The statutory framework establishing membership and eligibility for PERS Chapter 238 Program members is not currently addressed in administrative rule. While the general standard of “600 hours in a year” is well recognized, the application of that standard has varied over time with agency administration. This rule would articulate the standards by which membership and eligibility in the PERS Chapter 238 Program will be consistently determined.
- **Subject:** Standards for determining membership and eligibility under the PERS Chapter 238 Program.
- **Policy Issues:**
 1. What are the requirements to become and remain an “active member” of PERS?
 2. How should “year” be defined for purposes of qualifying?

BACKGROUND

The expectation of service to become a PERS Chapter 238 Program member is set forth in ORS 238.015(1): “No person may become a member of the system unless that person is in the service of a public employer and has completed six months’ service uninterrupted by more than 30 consecutive working days during the six months’ period. Every employee of a participating employer shall become a member of the system at the beginning of the first full pay period following the six months’ period.” This provision must be read in conjunction with ORS 238.015(4), which provides that “no employee whose position ... normally requires less than 600 hours of service per year may become a member of the system.”

SUMMARY OF PROPOSED RULE AND POLICY ISSUES

The proposed new rule begins with definitions, briefly summarized below:

- “Concurrent positions” means employment segments that occur together in any given month.
- “Qualifying position” means one position or concurrent positions where the employee is expected to perform 600 hours of service in a calendar year, with special rules for beginning and separating from service and actually meeting the 600 hour standard

even if the position was not expected to qualify. Contrasted with “Non-qualifying position.”

- “Service” means being employed and receiving “salary” as defined in statute.

Section (2) of the proposed rule describes how an employee becomes a PERS Chapter 238 Program member by completing their six-month waiting period in a qualifying position (or positions, if employment is concurrent), unless they are otherwise ineligible (like inmates or foreign nationals specifically excluded by statute) or opted out. Under section (3), an employee remains an “active member” by actually working 600 or more hours in a calendar year. Sections (4) and (5) describe special rules.

The rule is effective January 1, 2005 in order to encompass all hours performed for the entire calendar year.

Policy Issues:

1. What are the requirements to become and remain an “active member” of PERS?

These membership provisions evoke a basic dichotomy: Are employees required to actually work 600 hours, or only work in a position or positions where 600 hours are expected to be worked? To become a member, the “normally requires” standard makes sense: an employee must work six uninterrupted months in a position normally requiring 600 or more hours in a year to become a PERS Chapter 238 Program member. If an employee worked part-time, they would not complete 600 hours of service before their six-month waiting time was completed. That employee would not become a member on the first day of their seventh month, even if they worked in a position that required 600 or more hours in a year, unless their membership was predicated on what their position normally required.

Once becoming a member, however, the expectation standard cannot be justified to maintain status as an active member. An active member is defined in ORS 238.005(12)(a) as “a member who is presently employed by a participating public employer in a position that meets the requirements of ORS 238.015(4) [600 hours], and who has completed the six-month period of service required by ORS 238.015.” “Inactive member,” defined at ORS 238.005(12)(c), includes “a member who would be an active member except that the person’s only employment with a participating public employer is in a position that does not meet the requirements of ORS 238.015(4).”

The definitions of “active member” and “inactive member” change the plain meaning of the word “become,” in ORS 238.015(4), to its transitive meaning of “to be suitable for” either active or inactive membership. Once a person becomes a member by serving six months in a position that normally requires 600 hours, they must actually work the 600 hours in a year to maintain status as an active member.

These standards are reflected in the proposed rule. “Qualifying position” is defined at (1)(b) to include expected work of 600 hours per year to become a member, while section (3) requires a member to actually work 600 hours to maintain active membership.

2. *How should “year” be defined for purposes of qualifying?*

Three types of “years” are defined at various points in the PERS Plan: calendar, fiscal, and school. Besides the generic “year,” however, only “calendar year” is used anywhere in ORS Chapter 238 or 237 in reference to membership issues. In fact, ORS 238.480 indicates that the time frame for PERS transactions would be changed from “fiscal year” to “calendar year.”

ORS 238.015(4) does not specify which type of “year” applies to the 600-hour requirement. The use of the term “calendar year,” however, in ORS 238.005(7) appears to somewhat close that question. The definition of “employee” requires 600 total hours in a calendar year. ORS 238.015(4) states that one may not be a member without somehow meeting the 600 hours of service per year. It seems unreasonable to define employee in terms of a calendar year and then not require the same time period for membership eligibility.

The proposed rule adopts “calendar year” as the measure since that measure is most consistent with the legislative history of the operative provisions; is the measure used in the OPSRP Pension Program (and consistency between the programs is preferable); and promotes administrative predictability and consistency. The use of a fiscal year is not justified in statute, and using “school year” as a measure would not be appropriate for all categories of PERS Chapter 238 Program members nor make an appreciable difference in results for regularly employed members.

LEGAL REVIEW

The attached draft of OAR 459-010-0003 was submitted to the Department of Justice for legal review. They had no substantive comments or changes.

PUBLIC HEARING AND TESTIMONY

Public hearings were held on September 21 and 28, 2004 in Tigard and Salem respectively. No one attended either hearing.

In a January 5, 2005 email, Maria Keltner, representing the League of Oregon Cities and the Association of Oregon Counties, commented that subsection (4) of the rule was confusing. The proposed rule has been changed to clarify the treatment of an employee hired into a non-qualifying position who performs enough hours in a calendar year to qualify for active membership. Ms. Keltner also noted that subsection (6) did not include all statutory provisions that may apply in addition to the provisions in the proposed rule. In order to simplify the rule and avoid any confusion, that provision has been removed as those provisions are already covered in other administrative rules.

In a written comment dated November 19, 2004, included with this memo, Greg Hartman addressed the fundamental policy question surrounding the 600 hour requirement: is a PERS eligible employee required to perform 600 hours to be an active member of the system? Mr. Hartman comments that the proposed rule is inconsistent with the underlying statute in that the statute has never required any minimum hours for participation in the system.

Admittedly, PERS has not had clear, consistent standards for determining eligibility and membership in the Chapter 238 Program. PERS staff believes the proposed rule provides that clarification and reflects the entire statutory scheme, not just the provision which includes the “normally requires” language. Additionally, even though PERS has not used a consistent method, the agency has always administered the determination of eligibility and membership based on the requirement that a member actually work 600 or more hours. The proposed rule changes the measurement for the performance of the 600 hours from a rolling 12 months to a calendar year, but does not change the existing policy that the 600 hours must actually be worked.

Mr. Hartman further states that the change from a rolling basis to a calendar year will have an adverse impact on some employees. The calendar year basis is supported by statute, simplifies the process, and allows consistency between the PERS Chapter 238 Program and OPSRP. However, to alleviate any negative impacts that may affect members, the rule provides for continued active membership for members leaving the system before performing 600 or more hours in a calendar year, to mirror the result the rolling window policy accomplished.

IMPACT

Mandatory: No, but bringing certainty to this process is overdue. Even though no new members will join the PERS Chapter 238 Program, the agency handles numerous eligibility determination questions that should be decided under a consistent, reasonable structure.

Impact: Undoubtedly, adopting clear, consistent standards may result in some members being considered inactive for portions of their service time. These impacts cannot be determined systemically or predictably, but are as varied and unpredictable as the career paths members take as a whole. Adopting these standards will, however, restore predictability and consistency to the eligibility determination process and prevent further determinations based on uncertain or shifting criteria.

Cost:

- *Members:* There will be no cost to members.
- *Employers:* There are no intrinsic costs to employers. These standards are not being developed with the thought that membership will increase or decrease, but to provide for membership determinations under a clear, consistent framework.
- *Administration:* Eligibility reviews will have to change to follow the established standards, but these processes already involve manual review and calculation so these standards will not substantially affect costs to review and process membership or eligibility issues.
- *Fund:* There will be no effect on the Fund.

RULEMAKING TIMELINE

August 11, 2004	PERS Board authorized staff to begin the rulemaking process.
August 15, 2004	Notice of Rulemaking filed with the Secretary of State.
September 1, 2004	<i>Oregon Bulletin</i> published the Notice.
September 21 2004	Public hearing conducted in Tigard.
September 28, 2004	Public hearing conducted in Salem.
November 19, 2004	First reading of the proposed rule.
November 19, 2004	Public comment period ended.
February 18, 2005	Rule is presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The Board may:

1. Make a motion to “adopt OAR 459-010-0003, as presented, effective January 1, 2005.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** The rule is needed to articulate the standards by which membership and eligibility in the PERS Chapter 238 Program can be consistently determined.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD**

**CHAPTER 459
DIVISION 010 - MEMBERSHIP**

MEETING DATE	2-18-05
AGENDA ITEM	C.4. Mbrshp Elgblty (600 Hours)

459-010-0003 is added as follows:

1 **459-010-0003**

2 **Eligibility and Membership for the PERS Chapter 238 Program**

3

4 (1) For the purpose of this rule:

5 (a) "Concurrent positions" means positions with two or more PERS participating
6 employers where the positions occur together in any given calendar month.

7 (b) "Qualifying position" means a position or concurrent positions in which an
8 employee is expected to perform 600 or more hours of service in a calendar year.

9 (A) For purposes of initially determining qualification for membership, but not for any
10 other purpose, if an employee was employed in a position or concurrent positions for less than a
11 full calendar year and performed less than 600 hours of service in that calendar year, but would
12 have performed 600 hours of service or more if the employee had performed service in the same
13 position or concurrent positions for the full calendar year, and if the employee performs 600 or
14 more hours of service in the following calendar year, the position or concurrent positions will be
15 considered qualifying as of the initial date of employment.

16 (B) For purposes of determining qualification upon separation from employment, but not
17 for any other purpose, if an employee was employed in a position or concurrent positions for less
18 than a full calendar year and performed less than 600 hours of service in that calendar year, but
19 would have performed 600 hours of service or more if the employee had performed service in the
20 same position or concurrent positions for the full calendar year, and if the employee performed

1 600 or more hours of service in the previous calendar year, the position or concurrent positions
2 will be considered qualifying up to the date of separation.

3 (C) If an employee is employed in a position or in concurrent positions designated as
4 non-qualifying and performs 600 or more total hours of service in a calendar year, the position or
5 concurrent positions will be considered qualifying and the employee shall be considered to have
6 performed service in a qualifying position from the date of employment or January 1 of the
7 calendar year in which the employee performed more than 600 hours of service, whichever is
8 later.

9 (D) Except as provided in paragraph (A) and (B) of this subsection, if an employee is
10 employed in a position or concurrent positions designated as qualifying and performs less than
11 600 hours of service in a calendar year, the position or concurrent positions will be considered
12 non-qualifying from the date of employment or January 1 of the calendar year in which the
13 employee performed less than 600 hours of service, whichever is later.

14 (c) “Non-qualifying position” means:

15 (A) Any position that does not conform to the requirements set forth in subsection (b) of
16 this section;

17 (B) Positions with two or more PERS participating employers in which there is an
18 employee/employer relationship, as defined in OAR 459-010-0030, that do not meet the
19 definition of “concurrent positions” even though each position, when added together, may total
20 600 or more hours of service in a calendar year.

21 (d) “Service” means any calendar month an employee:

22 (A) Is in an employer/employee relationship, as defined in OAR 459-010-0030; and

1 (B) Received a payment of “salary,” as defined in ORS 238.005(20) or similar payment
2 from workers compensation or disability.

3 (2) An employee qualifies as a member of PERS under ORS 238.015 if the employee:

4 (a) Has completed a 6 month waiting period as defined in ORS 238.015(1);

5 (b) Has been employed in a qualifying position;

6 (c) Is not otherwise ineligible for membership; and

7 (d) Has not elected to participate in an optional or alternate retirement plan as provided in
8 ORS Chapters 243 and 353.

9 (3) An employee shall remain an active member in PERS if the employee is employed in
10 a qualifying position that totals 600 or more hours of service per calendar year.

11 (4) If an employee hired into a non-qualifying position completed service meeting the
12 definition of “qualifying position” under section (1)(b) of this rule, the employee shall qualify as
13 an active member for that calendar year.

14 (5)(a) If an active member in a qualifying position is terminated or they separate from
15 employment prior to completing 600 hours of service in a year, the member shall not receive any
16 service credit for that year unless they qualify under section (1)(b)(B) above.

17 (b) If an active member in a qualifying position is terminated or they separate from
18 employment prior to completing 600 hours of service in a year and do not qualify under section
19 (1)(b)(B), in addition to not receiving any service credit, all contributions for the year, employee
20 and employer, shall be credited to the employer.

21 (6) The provisions of this rule are effective on January 1, 2005.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.015, 243.800 and 353.250.



Oregon

Theodore R. Kulongoski, Governor

February 7, 2005

MEETING	2-18-05
DATE	
AGENDA	C.5.
ITEM	Chapter 238 Creditable Service

(503) 598-7377
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www.pers.state.or.us

TO: Members of the PERS Board
Key Reviewer: Brenda Rocklin

FROM: Steven Patrick Rodeman, Administrator, PPLAG

SUBJECT: Adoption of OAR 459-010-0014, *Creditable Service in PERS Chapter 238 Program*

OVERVIEW

- **Action:** Adopt OAR 459-010-0014.
- **Reason:** PERS members receive “creditable service” for “full months and major fractions of a month” under the definition at ORS 238.005(5). No consistent definition for “major fraction of a month” currently exists and interpretation has varied over time with agency administration. This rule clarifies and articulates the standards by which creditable service would be granted to members in the PERS Chapter 238 Program.
- **Subject:** Determining creditable service under the PERS Chapter 238 Program.
- **Policy Issue:** Should a “major fraction of a month” be defined in terms of number of hours or days performed in a calendar month?

BACKGROUND

Under ORS Chapter 238, a month of service credit is provided for members who work a major fraction of a month. How much service constitutes a major fraction proves difficult to determine for part-time employees, particularly substitute teachers. Because of the complicated nature of this issue and its impact on membership, this issue was presented to an advisory committee convened to discuss the issues of eligibility and membership.

SUMMARY OF PROPOSED RULE AND POLICY ISSUE

Policy Issue: *Whether a “major fraction of a month” should be defined in terms of number of hours or days performed in a calendar month.*

The advisory committee concurred that the cleanest solution was to divide the 600-hour yearly requirement by the twelve months, which would result in 50 hours of service constituting a major fraction of each month. There was initial concern that 50 hours was too low. With a qualifying position being defined as 600 hours, however, it was explained that it did not make sense to allow an employee who performed 600 hours to be considered a member, but not be entitled to any creditable service. Currently, PERS administers creditable service on a 50 hour a month basis.

Prior to the implementation of the new jClarety system, PERS did not collect hours or days worked on a system-wide basis. Only when creditable service became an issue at the time of retirement did PERS request hourly payroll information from employers. Because creditable service research often involved decades-old information, reconciling accounts was a difficult and time-consuming process.

Although, intuitively, a major fraction of a month seems like it should be measured in days, PERS has always operated on an hourly basis for eligibility and membership. Hourly information is currently being reported by employers for all employees and an hourly measurement more closely fits the 600 hour eligibility standard required in statute.

Using hours rather than days to measure eligibility is also more consistent with other requirements in ORS Chapters 238 and 238A. For instance, ORS Chapter 238A provides retirement credit based on number of hours worked in a calendar year. Additionally, hours are easier to track and would not require a significant change in the way creditable service has been determined in the past.

The rule is effective January 1, 2005 in order to encompass all hours performed for the entire calendar year.

LEGAL REVIEW

The attached draft of OAR 459-010-0014 was submitted to the Department of Justice for legal review. They had no suggested changes to the proposed rule.

PUBLIC COMMENT AND HEARING TESTIMONY

A public hearing was held on December 28, 2004; no one testified on this rule. The closing date for public comment on this proposed rule is January 28, 2005.

On December 7, 2004, Maria Keltner, on behalf of Local Government Personnel Institute, asked for clarification regarding why section (4) refers to only to (3)(b) instead of simply referring to section (3). The rule has been modified so that section (4) refers to section (3) as a whole. Additionally, Ms. Keltner requested clarification of the provision for granting creditable service to school employees so that it is clear that the provision applies only to school employees. That clarification has been made.

Greg Hartman also submitted comments via a letter dated November 19, 2004. His comments focused primarily on the definition and administration of “qualifying service” as set forth in the proposed rule OAR 459-010-0003, also being presented for Board adoption under Agenda Item C.4. (Mr. Hartman’s letter was included with that memo). While that definition does touch on the issue of creditable service, the 50-hour a month standard could be adopted without regard to the definition of qualifying service. Accordingly, staff has responded more fully to Mr. Hartman’s comments and concerns in the memo presented with OAR 459-010-0003, *PERS Membership Eligibility* (Agenda Item C.4.).

IMPACT

Mandatory: No, but bringing certainty to this process is overdue. Even though no new members will join the PERS Chapter 238 Program, the agency handles numerous creditable service questions that should be decided under a consistent, reasonable structure.

Impact: Although there is a chance that these rules may result in some members not receiving creditable service for periods of time, it is more likely that adopting these clear, consistent standards will result in the granting of creditable service to members who did not qualify under prior administrative practices. Adopting these standards will restore predictability and consistency to the eligibility determination process and prevent further determinations based on uncertain or shifting criteria.

Cost:

- ◆ *Members:* There will be no cost to members.
- ◆ *Employers:* There are no intrinsic costs to employers. These standards are not being developed with the thought that membership will increase or decrease, but to provide for the granting of creditable service under a clear, consistent framework.
- ◆ *Administration:* Creditable service reviews will not have to change to follow the established standards since creditable service has been granted under a similar standard for many years.
- ◆ *Fund:* There will be no effect on the Fund.

RULEMAKING TIMELINE

November 19, 2004	Notice of Rulemaking to the PERS Board. Stakeholders and legislators notified and the public comment period began.
December 1, 2004	<i>Oregon Bulletin</i> published the Notice.
December 28, 2004	Rulemaking hearing was held at PERS headquarters in Tigard.
January 25, 2005	First reading of the proposed rule.
January 28, 2005	Public comment period ended.
February 18, 2005	Rule is presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The Board may:

1. Make a motion to “adopt OAR 459-010-0014, as presented, effective January 1, 2005.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** The rule is needed to clarify and articulate the standards by which creditable service would be granted to members in the PERS Chapter 238 Program.

Adoption – OAR 459-010-0014

2/7/2005

Page 4 of 4

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is warranted.

**OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 010 - MEMBERSHIP**

MEETING	2-18-05
DATE	
AGENDA	C.5.
ITEM	Chapter 238 Creditable Svc

NEW RULE RELATING TO CREDITABLE SERVICE

459-010-0014 is added as follows:

1 Creditable Service in PERS Chapter 238 Program

2 (1) For purposes of this rule:

3 (a) "Service credit" has the same meaning as "creditable service" in ORS 238.005(5).

4 (b) "Major fraction of a month" means a minimum of 50 hours in any calendar month in
5 which an active member is being paid a salary by a participating public employer and
6 contributions are due to the system either by or on behalf of the member.

7 (2) An active member, as defined in ORS 238.005(12)(b), shall accrue one full month of
8 service credit if the employee:

9 (a) Is employed in a qualifying position as defined in OAR Chapter 459; and

10 (b) Works a major fraction of a calendar month.

11 (3) If the active member is a school employee, they may instead accrue one half year of
12 service credit if the employee:

13 (a) Is or was employed in a qualifying position as defined
14 in OAR Chapter 459; and

15 (b) Is employed for all portions of a school year when it is normally in session.

16 (4) Except as provided for under section (3) of this rule, an employee may not accrue
17 more than one full month of service credit for any number of hours worked in a calendar month
18 and no more than one year of service credit for any number of hours worked in a calendar year.

19 (5) The provisions of this rule are effective on January 1, 2005.

Stat. Auth.: ORS 238.650
Stats. Implemented: ORS 238.015



Oregon

Theodore R. Kulongoski, Governor

February 7, 2005

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	Tax Rules

Mailing Address:
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TO: Members of the PERS Board
Key Reviewers: Tom Grimsley
Brenda Rocklin

FROM: Steven Patrick Rodeman, Administrator, PPLAG

SUBJECT: Adoption of OAR 459-005-0506 to 0595, *Tax Rules*

OVERVIEW

- **Action:** Repeal the temporary rules OAR 459-005-0506 to 0595 and adopt permanent modifications to OAR 459-005-0506 to 0595.
- **Reason:** ORS Chapter 238A directs the PERS Board in several places to adopt rules regarding the application of federal tax laws to that plan. Additionally, federal law and rule changes since the last update of these rules need to be incorporated as well.
- **Subject:** Enacts federal tax provisions related to the PERS retirement plan.
- **Policy Issues:** These updates do not involve new policy issues as they just bring the existing rules into compliance with changes to federal laws or rules. The rules will also apply to the OPSRP programs, applying consistent limits and terms across the entire PERS Plan.

SUMMARY OF RULES

The proposed rule modifications affect a series of rules in the OAR Chapter 459, Division 005, relating to the administration of the PERS Plan. Generally, the modifications are to apply the IRS limitations to the new OPSRP programs in ORS Chapter 238A and update provisions that have been affected by federal law and rule changes. As a procedural matter, the Board must repeal the temporary rules the Board adopted in December as part of the permanent rule adoption.

The rules to be modified are summarized briefly below with explanations for the modifications to each rule affected:

OAR 459-005-0506, Plan Compliance with Federal Statutes and Regulations

Summary: Declares intention for this group of rules to comply with IRS requirements and provides definitions for this section of rules.

Modifications: Update statutory references to include the OPSRP programs and other changes. Add clarifying language in (2)(e) and (f) regarding federal tax treatment of the PERS Plan components as defined contribution or defined benefit plans.

OAR 459-005-0525, Ceiling on Compensation for Purposes of Contributions and Benefits

Summary: This rule establishes the maximum amount of a member's salary that can be taken into account for determining contributions (e.g., 6% of salary) or benefits (calculating Final Average Salary), in conformance with IRS Code §401(a)(17).

Modifications: Update statutory references to include OPSRP programs and terminology.

OAR 459-005-0535, Annual Benefit Limitation

Summary: IRS Code §415(b) limits how much a qualified plan can pay in benefits each year. This rule incorporates those limitations. For members who would otherwise receive benefits in excess of these limitations, that extra amount is paid out of the Benefit Equalization Fund, a non-qualified plan.

Modifications: Incorporate OPSRP statutory references and terminology. In section (6), changes the mortality table used for calculating benefit limitations to the table prescribed by the Internal Revenue Code.

OAR 459-005-0545, Annual Addition Limitation

Summary: IRS Code §415(c) limits how much a member can contribute to a qualified plan on an annual basis.

Modifications: In section (2)(a), reference is made to the Internal Revenue Code section method to adjust the annual limitation so it will increase consistently with the IRS' requirements. Section (5) was modified to add the qualifier that the military service be covered under the IRS code. Otherwise, changes are to incorporate OPSRP references.

OAR 459-005-0560, Required Minimum Distributions, Generally

Summary: IRS Code §401(a)(9) requires that a retirement plan member begin receiving plan distributions if the member has reached age 70½ and separated from employment.

Modifications: Updates references to IRS regulations that became final this past summer. Sections (2)(c), (h), and (4)(b), specify limitations and choices dictated by IRS rules. Note that in section (2)(e), IRS regulations used to prevent a member in RMD from "popping up" to Option 1; the new regulations allow that change, so the rule is changed accordingly.

OAR 459-005-0590, General Provisions and Applicability Date – Direct Rollovers

Summary: Introductory rule about PERS Plan benefits as eligible rollover distributions under IRS Code §401(a)(31).

Modifications: Incorporate OPSRP statutory references.

OAR 459-005-0591, Definitions – Direct Rollovers

Summary: Defines terms used in reference to rollovers from the PERS Plan.

Modifications: In section (4)(d), includes a provision that the rollover must be to a defined contribution plan that accepts the distribution.

OAR 459-005-0595, Limitations – Direct Rollovers

Summary: Places limits on a member's right to roll over distributions from the PERS Plan. The limitations in this OAR conform to those imposed by the IRS code and rule provisions cited.

Modifications: Add section (4) to clarify rollover eligibility for a PERS Plan distribution that is based in part on after-tax employee contributions includible in the member's gross income.

LEGAL REVIEW

These rule modifications were principally drafted by the Ice Miller firm and, as federal tax counsel, they advise their adoption as set forth.

PUBLIC COMMENT AND HEARING TESTIMONY

The comment period ended on Friday, January 28, 2005 at 5:00 p.m. PERS did not receive any public comment on these rules. A rulemaking hearing was held on Tuesday, January 25, 2005 and no members of the public attended.

EFFECTIVE DATE

As these rule modifications should apply to the 2004 tax year, they are presented with an effective date of January 1, 2004, to encompass the entire period of the OPSRP programs' existence and provide uniform coverage during the relevant tax year.

IMPACT

Mandatory: Yes, to comply with OPSRP programs' statutory provisions and incorporate IRS rule changes.

Impact: Moderate. Most of these provisions have already been incorporated in the PERS Chapter 238 program and the OPSRP programs are building these restrictions in place.

Cost: There is no substantial cost to stakeholders or the Fund as a result of the adoption of these rules.

- ◆ *Members.* Members will bear no costs from these rules.
- ◆ *Employers.* Employers will not bear any additional costs from these rules.
- ◆ *Administration.* The PERS Chapter 238 program is already administered with these restrictions. There are incremental costs in applying these restrictions to the OPSRP programs, but they are necessary to ensure the plan's tax qualified status.
- ◆ *Fund.* There is no direct cost to the fund other than the administrative expenses associated with incorporating these provisions into PERS Plan operations.

RULEMAKING TIMELINE

December 10, 2004	Notice of Rulemaking to PERS Board. PERS Board adopts the proposed temporary rule.
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December 15, 2004	Staff began the rulemaking process. Notice of Rulemaking filed with the Secretary of State.
December 15, 2004	Notice mailed to legislators, interested parties and stakeholders. Public comment period begins.
January 1, 2005	Oregon Bulletin published the Notice.
January 25, 2005 (a.m.)	Rulemaking hearing held at PERS headquarters in Tigard.
January 25, 2005 (p.m.)	First reading of the proposed rules.
January 28, 2005	Public comment period ended at 5:00 p.m.
February 18, 2005	Rules are presented to the PERS Board for adoption, including any changes resulting from public comment or reviews by staff or legal counsel.

BOARD OPTIONS

The Board may:

1. Make a motion to “repeal the temporary rules OAR 459-005-0506 to 0595 and adopt the permanent rule modifications to OAR 459-005-0506 to 0595, as presented, with a retroactive effective date of January 1, 2004.”
2. Take no action and direct staff to make changes to the rules or take other action.

STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- **Reason:** Provisions in the OPSRP programs require rulemaking and conforming changes to federal tax law are required to maintain the plan’s tax qualification.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted. The temporary rules the board adopted on December 10, 2004 will expire on June 1, 2005.

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	459-005-0506

1 OAR 459-005-0506 is amended as follows:

1 **459-005-0506**

2 **Plan Compliance with Federal Statutes and Regulations**

3 (1) The purpose of administrative rules OAR 459-005-0500 to 459-005-0799 is to
4 assure compliance with applicable federal statutes and regulations for governmental
5 retirement plans qualified under the Internal Revenue Code (IRC) Section 401(a), and to
6 implement ORS *[238.630(3)(h)]* **Chapters 238 and 238A** by establishing limits on
7 contributions and benefits under the Public Employees Retirement System (PERS)*], ORS*
8 *Chapter 238]*.

9 (2) Definitions in general for OAR 459-005-0500 to 459-005-0799:

10 (a) *["Membership"]* **“Member”** shall have the same meaning as provided in ORS
11 *[238.005(7).]* **238.005(12) with respect to members covered by ORS Chapter 238 and**
12 **as provided in ORS 238A.005(10) with respect to members covered by ORS Chapter**
13 **238A.**

14 (b) "Employment" means service as an employee as defined in OAR *[459-005-*
15 *0001(17).]* **459-005-0001(13).**

16 (c) "Board" shall have the same meaning as provided in *[OAR 459-005-0001(1).]*
17 **ORS 238.005(2).**

18 (d) "PERS" shall have the same meaning as provided in OAR *[459-005-0001(2).]*
19 **459-005-0001(23).**

1 (e) "Defined contribution plan (DC)" means a plan which provides for an individual
2 account for each participant and for benefits based solely on the amount contributed to
3 the participant's account, and any income, expenses, gains and losses, and any forfeitures
4 of accounts of other participants which may be allocated to such participant's account.

5 **For purposes of IRC Section 414(k), the individual account program under ORS**
6 **Chapter 238A shall be treated as a DC plan for the purposes of IRC Sections 72(d)**
7 **and 415.**

8 (f) "Defined benefit plan (DB)" means a plan which is not a defined contribution
9 plan. **For purposes of IRC Section 414(k), the pension programs under ORS**
10 **Chapters 238A and 238 shall be treated as part of a defined benefit plan for**
11 **purposes of IRC Sections 72(d) and 415.**

12 **(3) The provisions of this rule are effective on January 1, 2004.**

13 Stat. Auth.: ORS 238.630(3)(h), ORS 238.305 & ORS 238.650
14 Stats. Implemented: ORS 238

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	459-005-0525

1 OAR 459-005-0525 is amended as follows:

1 **459-005-0525**

2 **Ceiling on Compensation for Purposes of Contributions and Benefits**

3 (1) The purpose of this rule is to assure compliance of the Public Employees
4 Retirement System (PERS) with Internal Revenue Code (IRC) Section 401(a)(17)
5 relating to the limitation on annual compensation allowable for determining contribution
6 and benefits under ORS *[chapter]* **Chapters 238 and 238A.**

7 (2) Definitions:

8 (a) A "participant" shall mean an active or inactive member of PERS.

9 (b) An "eligible participant" shall mean a person who first becomes a member of
10 PERS before January 1, 1996.

11 (c) A "noneligible participant" shall mean a person who first becomes a member of
12 PERS after December 31, 1995.

13 (d) "Annual compensation" shall mean "salary," as defined in ORS 238.005(20) and
14 238.205~~[,]~~ **with respect to ORS Chapter 238 and in ORS 238A.005(16) with respect**
15 **to Chapter 238A** paid to the member during a calendar year or other 12-month period, as
16 specified in this rule.

17 (e) For the purposes of this rule~~[,]~~ **as it applies to ORS Chapter 238**, an "employer"
18 shall mean a "public employer" as defined in ORS 238.005(17). **For the purposes of this**
19 **rule as it applies to ORS Chapter 238A, an “employer” shall mean a “participating**
20 **public employer” as defined in ORS 238A.005(11).**

1 (3) For eligible participants, the limit set forth in IRC Section 401(a)(17) shall not
2 apply for purposes of determining the amount of employee or employer contributions that
3 may be paid into PERS, and for purposes of determining benefits due under ORS
4 *[chapter]* **Chapters 238[.] and 238A**. The limit on annual compensation for eligible
5 participants shall be no less than the amount which was allowed to be taken into account
6 for purposes of determining contributions or benefits under former ORS 237.001 to
7 237.315 as in effect on July 1, 1993.

8 (4) For noneligible participants, the annual compensation taken into account for
9 purposes of determining contributions or benefits under ORS *[Chapter]* **Chapters 238**
10 **and 238A** shall be measured on a calendar year basis, and shall not exceed \$200,000 per
11 calendar year beginning in 2002.

12 (a) The limitation on annual compensation will be indexed by cost-of-living
13 adjustments in subsequent years as provided in IRC Section 401(a)(17)(B).

14 (b) A noneligible participant employed by two or more agencies or instrumentalities
15 of a PERS participating employer in a calendar year, whether concurrently or
16 consecutively, shall have all compensation paid by the employer combined for
17 determining the allowable annual compensation under this rule.

18 (c) PERS participating employers shall monitor annual compensation and
19 contributions to assure that reports and remitting are within the limits established by this
20 rule and IRC Section 401(a)(17).

21 (5) For a noneligible participant, Final Average Salary under ORS 238.005(8) **with**
22 **respect to ORS Chapter 238 and under ORS 238A.130 with respect to ORS Chapter**

1 **238A** shall be calculated based on the amount of compensation that is allowed to be taken
2 into account under this rule.

3 (6) Notwithstanding section (4) and (5) of this rule, if the Final Average Salary as
4 defined in ORS 238.005(8) **with respect to Chapter 238 and as defined in ORS**
5 **238A.130 with respect to Chapter 238A** is used in computing a noneligible participant's
6 retirement benefits, the annual compensation shall be based on compensation paid in a
7 12-month period beginning with the earliest calendar month used in determining the 36
8 months of salary paid. For each 12-month period, annual compensation shall not exceed
9 the amount of compensation that is allowable under this rule for the calendar year in
10 which the 12-month period begins.

11 (7) [*Creditable*] **With respect to ORS Chapter 238, creditable** service, as defined
12 in ORS 238.005(5), shall be given for each month that an active member is paid salary or
13 wages and allowable contributions have been remitted to PERS, or would be remitted but
14 for the annual compensation limit in IRC Section 410(a)(17). **With respect to ORS**
15 **Chapter 238A, retirement credit as determined in ORS 238A.140, shall be given for**
16 **each month that an active member is paid salary or wages and allowable**
17 **contributions have been remitted to PERS, or would be remitted but for the annual**
18 **compensation limit in IRC Section 401(a)(17).**

19 **(8) The provisions of this rule are effective on January 1, 2004.**

20 Stat. Auth.: ORS 238.630, [*&*] ORS 238.650 **and 238A.005(16)(i)**
21 Stats. Implemented: ORS 238

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	459-005-0535

1 OAR 459-005-0535 is amended as follows:

1 **459-005-0535**

2 **Annual Benefit Limitation**

3 (1) Applicable Law. This administrative rule shall be construed consistently with the
4 requirements of the Internal Revenue Code (IRC) Section 415(b) and the Treasury
5 regulations and Internal Revenue Service rulings and other interpretation issued
6 thereunder.

7 (2) Annual Benefit Limitation. The benefits payable to any member for a calendar
8 year, when expressed as an annual benefit, shall not exceed the applicable dollar
9 limitation for that year.

10 (3) Applicable Dollar Limitation. For purposes of this rule, the "applicable dollar
11 limitation" for each calendar year is the limitation in effect under IRC Section
12 415(b)(1)(A), with the adjustment described as follows:

13 (a) Cost-of-Living Adjustments. The limitation under IRC Section 415(b)(1)(A)
14 shall be adjusted for cost of living in accordance with IRC Section 415(d).

15 (b) Reduction for Retirement Before Age 62. Except as otherwise provided in the
16 paragraphs (A), (B), and (C) of this subsection, if the member's benefit begins before the
17 member reaches 62 years of age, the applicable dollar limitation shall be adjusted as
18 provided for in IRC Section 415(b)(2)(C).

19 (A) This reduction shall not apply to any member who has at least 15 years of
20 creditable service as a full-time employee of a police department or fire department

1 which is organized and operated by the state or a political subdivision of the state to
2 provide police protection, firefighting services, or emergency medical services for any
3 area within the jurisdiction of the state or political subdivision.

4 (B) This reduction shall not apply to disability retirement allowances or death
5 benefits.

6 (C) This reduction shall not apply to any portion of a member's annual benefit that is
7 derived from contributions to purchase service credit, as defined in OAR 459-005-0540,
8 Permissive Service Credit.

9 (c) Reduction for Less than 10 Years of Membership. Except as provided in
10 paragraphs (A) and (B) of this subsection, if the member has less *[that]* **than** 10 years of
11 active membership in PERS, the applicable dollar limitation shall be reduced as provided
12 for under IRC Section 415(b)(5)(A).

13 (A) For the purposes of this section, a member with less than one year of active
14 membership shall be treated as having one year of active membership.

15 (B) The reduction under this section shall not apply to disability retirement
16 allowances or death benefits.

17 (d) Increase for Retirement After Age 65. If the member's benefit begins after the
18 member reaches 65 years of age, the applicable dollar limitation shall be increased as
19 provided for under IRC Section 415(b)(2)(D).

20 (4) Annual Benefit. For purposes of this rule, the "annual benefit" is the benefit
21 payable to a member under ORS *[c]*Chapter 238 **and the pension program under ORS**
22 **Chapter 238A** for a calendar year, excluding any benefit payable under ORS 238.485
23 *[to]* **through** 238.492, and adjusted as described in this section.

1 (a) Excludable Benefits. The annual benefit shall not include the portion of the
2 member's benefit that is attributable to:

3 (A) After-tax member contributions, other than member *[payment]* **payments** to
4 purchase permissive service credit as defined in OAR 459-005-0540, Permissive Service
5 Credit;

6 (B) Rollover contributions, if such contributions are permitted; *[and]*

7 (C) A transfer of assets from another qualified retirement plan*[.]*; **and**

8 (D) Purchases of permissive service credit, as defined in OAR 459-005-0540,
9 Permissive Service Credit, if all of the member's payments to purchase permissive service
10 credit are treated as annual additions for purposes of OAR 459-005-0545, Annual
11 Addition Limitation*[.]*, **in the year purchased.**

12 (b) Adjustment to Straight Life Annuity. The member's benefit shall be adjusted to
13 an actuarially equivalent straight life annuity beginning at the same age. For purposes of
14 this adjustment, the following values are not taken into account:

15 (A) The value of a qualified spouse joint and survivor annuity to the extent that the
16 value exceeds the sum of*[:]* the value of a straight life annuity beginning on the same
17 day, and the value of any post-retirement death benefits that would be payable even if the
18 annuity was not in the form of a joint survivor annuity.

19 (B) The value of benefits that are not directly related to retirement benefits, such as
20 pre-retirement disability benefits and post-retirement medical benefits.

21 (C) The value of post-retirement cost of living increases, to the extent they do not
22 exceed the increase provided under IRC Section 415(d) and Treasury Regulation Section
23 1.415-5.

1 (5) Interest Rates. The following interest rates shall apply for purposes of adjusting
2 the applicable dollar limitation under section (3) of this rule and the annual benefit under
3 section (4) of this rule.

4 (a) For purposes of reducing the applicable dollar limitation for retirement before 62
5 years of age under subsection (3)(b) of this rule, the interest rate shall be the greater of
6 five percent or PERS' assumed earnings rate.

7 (b) For purposes of determining the portion of a member's benefits attributable to
8 after-tax member contributions under paragraph (4)(a)(A) of this rule, the interest rate
9 shall be the greater of 5 percent or the PERS' assumed earnings rate.

10 (c) For purposes of adjusting the member's annual benefits under section (4) of this
11 rule (other than the adjustment for after-tax member contributions), the interest rate shall
12 be the greater of five percent or PERS' assumed earnings rate.

13 (d) For purposes of increasing the applicable dollar limitation for retirement after 65
14 years of age under subsection (3)(d) of this rule, the interest rate shall be the lesser of five
15 percent or PERS' assumed earnings rate.

16 (6) Mortality Table. For purposes of adjusting the applicable dollar limitation and
17 annual benefit under sections (3) and (4) of this rule, the mortality table used shall be[:]

18 **the table prescribed pursuant to the Internal Revenue Code.**

19 *[(a) Before January 1, 2000, the table adopted by the board for calculating*
20 *actuarially equivalent forms of benefits.*

21 *(b) Effective January 1, 2000, the table prescribed by the Internal Revenue Service.*

1 *(7) Retroactive Application. Except as provided below, the provisions of this rule*
2 *shall be applied retroactively to January 1, 1987. The amendments adopted in 2002 shall*
3 *be effective as of January 1, 2002.]*

4 **(7) The provisions of this rule are effective on January 1, 2004.**

5 Stat. Auth.: ORS 238.630, [**&**] ORS 238.650 **and 238A.125**

6 Stats. Implemented: ORS 238.005 - ORS 238.715

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING DATE	2-18-05
AGENDA ITEM	C.6. 459-005-0545

1 OAR 459-005-0545 is amended as follows:

2 **459-005-0545**

3 **Annual Addition Limitation**

4 (1) Applicable Law. This administrative rule shall be construed consistently with the
5 requirements of the Internal Revenue Code (IRC) Section 415(c) and the Treasury
6 regulations and Internal Revenue Service rulings and other interpretations issued
7 thereunder.

8 (2) Annual Addition Limitation. Except as otherwise provided in this rule, no
9 member's annual additions to PERS for any calendar year (after 2001) shall exceed the
10 lesser of the following amounts:

11 (a) \$40,000 (as adjusted *[by the Internal Revenue Service for cost of living]; or*
12 **under IRC Section 415(d); or**

13 (b) One hundred percent of the member's compensation for the calendar year (as
14 defined in IRC Section 415(c)(3)).

15 (3) Annual Additions. For purposes of this rule, the **term** "annual additions" *[have]*
16 **has** the same meaning as under IRC Section 415(c)(2).

17 (4) Permissive Service Credit. The following special rules shall apply with respect to
18 purchases of permissive service credit, as defined in OAR 459-005-0540, Permissive
19 Service Credit:

20 (a) If a member's after-tax contributions to purchase permissive service credit are
included in the member's annual additions under section (3) of this rule, the member shall

1 not be treated as exceeding the 100 percent of compensation limitation under subsection
2 (2)(b) of this rule solely because of the inclusion of such contributions.

3 (b) With respect to any eligible participant, the annual addition limitation in section
4 (2) of this rule shall not be applied to reduce the amount of permissive service credit to an
5 amount less than the amount that could be purchased under the terms of the plan as in
6 effect on August 5, ~~[1995]~~1997. As used in this subsection, the term "eligible participant"
7 includes any individual who ~~[is or will become]~~ **became** an active member before
8 January 1, 2000.

9 (5) Purchase of Service in the Armed Forces Under ORS ~~[238.156.]~~ **238.156 or**
10 **238A.150**. If a member makes a payment to PERS to purchase retirement credit for
11 service in the Armed Forces pursuant to ORS 238.156(3)(c)~~[.]~~ **or ORS 238A.150 and**
12 **the service is covered under Internal Revenue Code Section 414(u)**, the following
13 special rules shall apply for purposes of applying the annual addition limitation in section
14 (2) of this rule:

15 (a) The payment shall be treated as an annual addition for the calendar year to which
16 it relates;

17 (b) The payment shall not be treated as an annual addition for the calendar year in
18 which it is made; and

19 (c) The member shall be treated as having received the following amount of
20 compensation for the period of service in the Armed Forces to which the payment relates:

21 (A) The amount of compensation the member would have received from a
22 participating employer had the member not been in the Armed Forces; or

1 (B) If the amount in paragraph (A) of this subsection is not reasonably certain, the
2 member's average compensation from the participating employer during the 12-month
3 period immediately preceding the period of service in the Armed Forces (or, if shorter,
4 the period of employment immediately preceding the period of service in the Armed
5 Forces).

6 *[(6) Retroactive Application. Except as otherwise provided in this rule, the*
7 *provisions of this rule shall be applied retroactively to January 1, 1987.]*

8 **(6) The provisions of this rule are effective on January 1, 2004.**

9 Stat. Auth.: ORS 238.630, *[&]* ORS 238.650 **and 238A.370**
10 Stats. Implemented: ORS 238.005 - ORS 238.715

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	459-005-0560

OAR 459-005-0560 is amended as follows:

1 **459-005-0560**

2 **Required Minimum Distributions, Generally**

3 (1) Applicable Law. Distributions under the Public Employees Retirement System
4 (PERS) shall be made in accordance with Internal Revenue Code (IRC) Section
5 401(a)(9), including IRC Section 401(a)(9)(G), and the Treasury regulations and Internal
6 Revenue Service rulings and other interpretations issued thereunder, including
7 *[Proposed]* Treasury Regulation *[Section 1.401(a)(9)-2]* **Sections 1.401(a)(9)-1 through**
8 **1.401(a)(9)-9**. The provisions of this administrative rule and any other statute or
9 administrative rule reflecting the required minimum distribution requirements of IRC
10 Section 401(a)(9) shall override any distribution options that are inconsistent with IRC
11 Section 401(a)(9).

12 (2) Distributions to Members. Each member's entire benefit under PERS shall be
13 distributed to the member, beginning no later than the required beginning date, over the
14 member's lifetime (or the joint lives of the member and a designated beneficiary), or over
15 a period not extending beyond the member's life expectancy (or the joint life expectancies
16 of the member and a designated beneficiary).

17 (a) Required Beginning Date. For purposes of this section, the "required beginning
18 date" is April 1 of the calendar year after the later of the following:

- 19 (A) The calendar year in which the member reaches age 70½; or
- 20 (B) The calendar year in which the member retires.

1 (b) Designated Beneficiary. For purposes of this section, a "designated beneficiary"
2 means any individual designated as a beneficiary by the member. If the member
3 designates a trust as a beneficiary, the individual beneficiaries of the trust shall be treated
4 as designated beneficiaries if the trust satisfies the requirement set forth in *[Proposed]*
5 Treasury Regulation Section 1.401(a)(9)-*[1, Q&A-D-5]*4.

6 (c) Calculation of Life Expectancies. For purposes of this section **and Chapter 238**
7 **benefits and the Pension Program, which are part of the DB component of PERS,**
8 life expectancies shall not be recalculated after the initial determination*[.]*, **unless**
9 **otherwise required by Treasury Regulation Section 1.401(a)(9)-5, Q&A-4 and Q&A-**
10 **5. For purposes of this section and the Individual Account Program, life**
11 **expectancies shall be recalculated but no more frequently than annually, unless**
12 **otherwise required by Treasury Regulation Section 1.401(a)(9)-5, Q&A-5.**

13 (d) Limitations on Benefit Changes. *[Notwithstanding ORS 238.305(4) and*
14 *238.325(2), a]* A retired member who has had a required beginning date shall not change
15 a beneficiary designation, benefit option election, or any other designation or election
16 *[under ORS 238.305(1), (2), or (3).]* **except as permitted under Treasury Regulation**
17 **Sections 1.401(a)(9)-4 and 1.401(a)(9)-6.**

18 (e) Limitations on Conversion of Joint Annuity to Single Life Annuity Following
19 Divorce. *[Notwithstanding ORS 238.305(5) and 238.325(3), a]* A retired member who
20 has had a required beginning date may *[not]* elect to convert a joint and survivor annuity
21 under Option 2A or 3A **under Chapter 238** to a single life annuity by reason of the
22 member's divorce from the joint annuitant, **subject to the provisions of Treasury**

1 **Regulation Section 1.401(a)(9)-6. This section applies to ORS Chapter 238 benefits**
2 **notwithstanding ORS 238.305(5) and 238.325(3).**

3 (f) Limitations on Survivor Annuity Elections. Except as otherwise required by a
4 domestic relation order under ORS 238.465, if a member elects a 100 percent (100%)
5 joint and survivor annuity (Option 2 or 2A under ORS 238.305(1) **and under ORS**
6 **238A.190(1)(a)** and designates a nonspouse beneficiary who is more than ten years
7 younger than the member[,] **as calculated under Treasury Regulation Section**
8 **1.401(a)(9)-6, Q&A-2**, the benefit shall be actuarially adjusted to provide for a reduced
9 survivor annuity benefit to the extent necessary to comply with federal *[requirement]*
10 **requirements** for qualified retirement plans.

11 (g) Limitation on Period-Certain Annuity Election (**Chapter 238 only**). If a member
12 elects a 15-year certain option (Option 4 under ORS 238.305(1)), and attains age *[84]* **85**
13 or older during the calendar year in which the benefits commence, the benefit shall be
14 actuarially adjusted to provide for a shorter payout period to the extent necessary to
15 comply with federal requirement for qualified retirement plans.

16 **(h) Limitation on Selection of IAP Benefit Options. Benefit payment options**
17 **selected under the Individual Account Program shall be considered as payment**
18 **options under a DC plan and must comply with the requirements of Treasury**
19 **Regulation Section 1.401(a)(9)-5.**

20 (3) Distributions to Beneficiaries of Retired Members. If a retired member dies after
21 **annuity** benefits payments have begun *[or]* **under Chapter 238 or the Pension**
22 **Program or other benefit payments** are required to begin under section (2) or this rule,

1 any death benefits shall be distributed at least as rapidly as under the distribution method
2 being used at the member's death.

3 (4) Distributions to Beneficiaries of Active and Inactive Members. If an active or
4 inactive member dies before *[benefit]* annuity payments have begun *[or]* under
5 **Chapter 238 or the Pension Program or other benefit payments** are required to begin
6 under section (2) of this rule, any death benefits shall be distributed by December 31 of
7 the calendar year that contains the fifth anniversary of the member's death, except as
8 provided in the following:

9 (a) Distributions to Designated Beneficiaries. The five-year rule shall not apply to
10 any death benefit that is payable to a member's designated beneficiary, if:

11 (A) The benefit is distributed over the designated beneficiary's lifetime or over a
12 period not extending beyond the designate beneficiary's life expectancy; and

13 (B) The distributions begin no later than December 31 of the calendar year that
14 contains the first anniversary of the member's death.

15 (b) **Distributions to Spouse Designated Beneficiaries.** Notwithstanding subsection
16 (a) of this section, if the designated beneficiary is the member's surviving spouse **as**
17 **defined by the Internal Revenue Code:**

18 (A) The commencement of distributions under subsection (a)(B) of this section may
19 be delayed until December 31 of the calendar year in which the member would have
20 reached age 70½; and

21 (B) If the surviving spouse dies after the member's death but before the distributions
22 to the spouse have begun, the rules of this section shall apply to any death benefit payable
23 to any contingent beneficiary as if the spouse were the member. Notwithstanding the

1 foregoing, however, this subsection shall not apply to any death benefit payable to a
2 surviving spouse of the deceased member's surviving spouse.

3 *[(5) Retroactive Application. The provisions of this rule shall be applied*
4 *retroactively to January 1, 1987.]*

5 **(5) The provisions of this rule are effective on January 1, 2004.**

6 Stat. Auth.: ORS 238.630, [**&**] ORS 238.650, **ORS 238A.130, ORS 238A.170 and ORS**
7 **238A.410**

8 Stats. Implemented: ORS 238.005 - ORS 238.715

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING DATE	2-18-05
AGENDA ITEM	C.6. 459-005-0590

1 OAR 459-005-0590 is amended as follows:

1 **459-005-0590**

2 **General Provisions and Applicability Date -- Direct Rollovers**

3 (1) OAR 459-005-0590 to 459-005-0599 apply to direct rollover distributions made
4 on or after January 1, 1993.

5 (2) Notwithstanding any provision to the contrary in ORS *[chapter]* **Chapters** 238
6 **or 238A** or any administrative rule of the Public Employees Retirement Board other than
7 OAR 459-005-0590 to 459-005-0599, a distributee may elect, in accordance with OAR
8 459-005-0599, to have any portion of an eligible rollover distribution paid directly to an
9 eligible retirement plan specified by the distributee in a direct rollover.

10 (3) The direct rollover rule OAR 459-005-0590 to 459-005-0599 shall be interpreted
11 and administered in accordance with Code Section 401(a)(31) and any applicable
12 regulations and administrative rulings thereunder.*["]*

13 **(4) The provisions of this rule are effective on January 1, 2004.**

14 Stat. Auth.: ORS 238.650, **238A.430**
15 Stats. Implemented: ORS 238.005 - ORS 238.715

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING DATE	2-18-05
AGENDA ITEM	C.6. 459-005-0591

1 OAR 459-005-0591 is amended as follows:

1 **459-005-0591**

2 **Definitions -- Direct Rollovers**

3 As used in OAR 459-005-0590 to 459-005-0599 the following words and phrases
4 shall have the following meanings:

5 (1) "Code" means the Internal Revenue Code of 1986, as amended.

6 (2) A "direct rollover" means the payment of an eligible rollover distribution by
7 PERS to an eligible retirement plan specified by the distributee.

8 (3) A "distributee" includes a PERS member, the surviving spouse of a deceased
9 PERS member, and the current or former spouse of a PERS member who is the alternate
10 payee under a domestic relations order that satisfies the requirements of ORS 238.465
11 and the rules adopted thereunder.

12 (4) An "eligible retirement plan" means any one of the following:

13 (a) An individual retirement account or annuity described in Code Section 408(a) or
14 (b), but shall not include a Roth IRA as described in Code Section 408A;

15 (b) An annuity plan described in Code Section 403(a) that accepts the distributee's
16 eligible rollover distribution;

17 (c) A qualified trust described in Code Section 401(a)[, *but only if it is a defined*
18 *contribution plan*] that accepts the distributee's eligible rollover distribution;

1 (d) An eligible deferred compensation plan described in Code Section 457(b) which
2 is maintained by an eligible employer described in Code Section 457(e)(1)(A) [;] **and**
3 **accepts the distributee's eligible rollover distribution.**

4 (e) An annuity contract described in Code Section 403(b) that accepts the
5 distributee's eligible rollover distribution.

6 (f) For the purposes of ORS 237.650(3), the individual employee account maintained
7 for a member under the Individual Account Program as set forth under ORS
8 238A.350(2); and

9 (g) For the purposes of ORS 237.655(2), the state deferred compensation program.

10 (5) An "eligible rollover distribution" means any distribution of all or any portion of
11 a distributee's PERS benefit, except that an eligible rollover distribution shall not include:

12 (a) Any distribution that is one of a series of substantially equal periodic payment
13 made no less frequently than annually for the life (or life expectancy) of the distributee or
14 the joint lives (or life expectancies) of the distributee and the distributee's designated
15 beneficiary, or for a specified period of ten years or more;

16 (b) Any distribution to the extent that it is a required or minimum distribution under
17 Code Section 401(a)(9).

18 (6) A "recipient plan" means an eligible retirement plan that is designated by a
19 distributee to receive a direct rollover.

20 *[(7) The provisions of this rule shall be applicable as of the calendar year beginning*
21 *January 1, 2002.]*

22 **(7) The provisions of this rule are effective on January 1, 2004.**

23 Stat. Auth.: ORS 238.650
24 Stats. Implemented: ORS 238.005 - ORS 238.715

25

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459
DIVISION 005 – ADMINISTRATION

MEETING	2-18-05
DATE	
AGENDA	C.6.
ITEM	459-005-0595

1 OAR 459-005-0595 is amended as follows:

1 **459-005-0595**

2 **Limitations -- Direct Rollovers**

3 Notwithstanding any provision to the contrary in OAR 459-005-0590 to 459-005-
4 0599, a distributee's right to elect a direct rollover is subject to the following limitations:

5 (1) A distributee may elect to have an eligible rollover distribution paid in a direct
6 rollover to only one eligible retirement plan.

7 (2) A distributee may elect a direct rollover only when his or her eligible rollover
8 distribution(s) during a calendar year is reasonably expected to total \$200 or more.

9 (3) A distributee may elect to have part of an eligible rollover distribution be paid
10 directly to the distributee, and to have part of the distribution paid as a direct rollover
11 only if the member elects to have at least \$500 transferred to the eligible retirement plan.

12 **(4) The provisions of (1) apply to any portion of a distribution, including after-**
13 **tax employee contributions that are not includible in gross income. Any portion of a**
14 **distribution that consists of after-tax employee contributions that are not includible**
15 **in gross income may be transferred only to an individual retirement account or**
16 **annuity described in Code Section 408(a) or (b), or to a qualified defined**
17 **contribution plan that agrees to separately account for the amounts transferred,**
18 **including separate accounting for the pre-tax and post-tax amounts. The amount**
19 **transferred shall be treated as consisting first of the portion of the distribution that**
20 **is includible in gross income, determined without regard to Code Section 402(c)(1).**

1 **(5) The provisions of this rule are effective on January 1, 2004.**

2 Stat. Auth.: ORS 238.650

3 Stats. Implemented: ORS 238.005 - ORS 238.715

4



Oregon

Theodore R. Kulongoski, Governor

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MEETING	2-18-05
DATE	
AGENDA	C.7.
ITEM	OAR 459-070-0001 PERS / OPSRP

February 7, 2005

TO: Members of the PERS Board
Key Reviewers: Eva Kripalani (OPSRP IAP)
Thomas Grimsley (OPSRP Pension Program)

FROM: Steven Patrick Rodeman, Administrator, PPLAG

SUBJECT: Adoption of Temporary Rule; Notice of Rulemaking
OAR 459-070-0001, *Definitions*

OVERVIEW

- **Action:** Adopt temporary rule OAR 459-070-0001 related to the Oregon Public Service Retirement Plan (OPSRP) Pension Program and the Individual Account Program (IAP) and begin permanent rulemaking.
- **Reason for Temporary Rule:** As staff has continued to identify transactions that occur now that OPSRP is in operation, several issues have arisen that require immediate attention to administer the new plan. A temporary rule is needed to administer IAP contributions and distributions in a clear and consistent manner until a permanent rule can be adopted.
- **Subject:** Clarifies the definition of “qualifying position” so staff can administer contributions into and distributions from the IAP; makes the definition consistent with the PERS Chapter 238 Program members who are now members of the IAP; simplifies the tracking and administration of these member accounts.
- **Policy Issue:** Should the definition of “qualifying position” for OPSRP members be consistent with the PERS Chapter 238 Program and provide for continued active membership when a member leaves covered service before performing 600 hours in calendar year?

SUMMARY OF RULE AND POLICY ISSUE

This temporary rule defines “qualifying service” for the OPSRP Pension Program and the IAP in a manner consistent with the PERS Chapter 238 Program.

Generally, an eligible employee is not an active member of the PERS Chapter 238 Program or OPSRP unless they perform 600 hours in a calendar year. However, under the previously adopted version of OAR 459-070-0001 (OPSRP) and proposed OAR 459-010-0003 (PERS), for the initial determination of eligibility, an employee will be considered to be in a qualifying position if the employee performs less than 600 hours in their first calendar year and performs at least 600 hours in the subsequent year. Otherwise, employees hired into qualifying positions late in the year would not be eligible to begin their waiting periods even though they were in qualifying positions.

Although the previously adopted OPSRP rule provides the same consideration for incoming employees as the proposed PERS Chapter 238 Program rules, the PERS rule provides for the same treatment of employees leaving the system as it does for those coming into the system. The current version of the OPSRP rule does not.

The PERS Chapter 238 Program provision prevents the negative impact that would occur on members who leave the system early in the year, providing for continuing service if they were in a qualifying position the previous year. Unless the two sets of rules are consistent, PERS Chapter 238 Program members who separate from employment early in the year before performing 600 hours of service would receive service credit but not IAP contributions. This inconsistency cannot reasonably be administered or tracked under the current programming and is resulting in delays in distributing IAP funds and calculating PERS Chapter 238 Program retirements.

The temporary rule provides for a member who is in a qualifying position to have active membership continue until separation if that member was in a qualifying position for the previous year. This provision mirrors the PERS Chapter 238 Program rule that is also presented for adoption. Creating consistent standards will simplify the administration of benefits and eliminate the current confusion for employers trying to report into the system.

Additionally, the previous rule was adopted prior to HB 2020 being codified. Now that the bill sections have been codified, the correct citations have been added.

JUSTIFICATION FOR TEMPORARY RULE

The need for this rule was recognized as staff has continued to identify transactions that may occur now that OPSRP is in operation. The issue addressed by this temporary rule require immediate attention to administer benefits until the agency can complete the process to adopt permanent rules. This new rule must be adopted as a temporary rule to be in effect retroactively to January 1, 2004, to cover any of these situations that may have arisen after OPSRP became effective.

LEGAL REVIEW

The attached draft of OAR 459-090-0001 has been submitted to legal counsel for review. Any concerns will be brought forward before the rule is presented for adoption at the meeting.

EFFECTIVE DATE

This rule will become effective upon filing but will be retroactively applied back to January 1, 2004. The maximum period it can remain in effect is 180 days, but staff will immediately begin permanent rulemaking to replace this temporary rule.

RULEMAKING TIMELINE

- | | |
|-------------------|-------------------------------------------------------------------------------------------------------------------------------|
| February 15, 2005 | Staff initiates rulemaking process. Stakeholders and legislators notified and the public comment period begins. |
| February 18, 2005 | PERS Board may adopt the proposed temporary rule PERS staff will proceed with permanent rulemaking unless otherwise directed. |
| March 1, 2005 | <i>Oregon Bulletin</i> publishes the Notice of Rulemaking Hearing. |
| March 29, 2005 | Rulemaking hearing takes place. |

- April 15, 2005 First reading of the proposed new rule. Staff may present recommended changes to the draft rules and stakeholders in attendance may comment to the Board.
- April 29, 2005 Public comment period ends.
- May 20, 2005 PERS Board may adopt the proposed new permanent rule.

IMPACT

Mandatory: Not statutorily mandated, but clarification for administration is needed.

Impact: Minimal if adopted. Stakeholders would have a clearer understanding of their eligibility criteria.

Cost: There is no substantial cost to stakeholders or the Fund as a result of the adoption of these rules. To the contrary, failure to adopt them could result in increased inquiries and disputes if member eligibility is not clearly established.

- ◆ *Members.* IAP and PERS Chapter 238 Program members may experience delays in obtaining benefits if there are not consistent administrative provisions. Likewise, lack of direction and clarification could result in over- or under-payments of benefits. By creating consistency between the programs, the required transactions and processes can be handled more efficiently.
- ◆ *Employers.* Employers will be required to pay applicable contributions for members in qualifying positions.
- ◆ *Administration.* The implementation of OPSRP, in general, has resulted in a significant administrative impact. New PERS positions have been added by the Oregon Legislature to handle this impact.
- ◆ *Fund.* There is no direct cost to the fund.

BOARD OPTIONS

The Board may:

1. Make a motion to “adopt OAR 459-070-0001 as a temporary rule, to be effective January 1, 2004, and direct staff to begin permanent rulemaking.”
2. Take no action and direct staff to make changes to the rule or take other action.

STAFF RECOMMENDATIONS

Staff recommends the Board adopt OAR 459-070-0001 as a temporary rule as presented. Staff will also proceed with permanent rulemaking unless otherwise directed.

- **Reason:** Adoption of this rule would clearly articulate the standards by which qualification for members can be consistently determined.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

OREGON ADMINISTRATIVE RULE
PUBLIC EMPLOYEES RETIREMENT BOARD
CHAPTER 459

MEETING	2-18-05
DATE	
AGENDA	C.7.
ITEM	OAR 459-070-0001

DIVISION 70 – OREGON PUBLIC SERVICE RETIREMENT PLAN, GENERALLY

459-070-0001 is amended as follows:

1 **459-070-0001**

2 **Definitions**

3 The words and phrases used in this Division have the same meaning given them in *[chapter*
4 *733, Oregon Laws 2003 (Enrolled HB 2020)]* [ORS 238A.005](#) unless otherwise indicated in this
5 rule. Specific and additional terms for purposes of Divisions 70, 75 and 80 are defined as follows
6 unless context requires otherwise:

7 (1) "Break in service" means a period concluding on or after August 29, 2003, during which
8 a member of PERS performs no service, as defined below, with a participating public employer
9 in a qualifying position for a duration of:

10 (a) Six or more consecutive calendar months; or

11 (b) 12 or more consecutive calendar months under one of the following circumstances:

12 (A) The member of PERS ceases performance of service for purposes that have qualified the
13 member for family leave, as described in *[section 2(3)(c), chapter 733, Oregon Laws 2003*
14 *(Enrolled HB 2020)]* [ORS 238A.025\(3\)\(c\)](#), as determined by the employer; or

15 (B) The member of PERS ceases performance of service for career development purposes,
16 as described in *[section 2(3)(d), chapter 733, Oregon Laws 2003 (Enrolled HB 2020)]* [ORS](#)
17 [238A.025\(3\)\(d\)](#).

18 (2) "Calendar month" means a full month beginning on the first calendar day of a month and
19 ending on the last calendar day of the same month.

20 (3) "Calendar year" means 12 calendar months beginning on January 1 and ending on
21 December 31 following.

1 (4) "Employee" has the same meaning as "eligible employee" in *[section 1(4), chapter 733,*
2 *Oregon Laws 2003 (Enrolled HB 2020)]* [ORS 238A.005\(4\)](#).

3 (5) "Employee class" means a group of similarly situated employees whose positions have
4 been designated by their employer in a policy or collective bargaining agreement as having
5 common characteristics.

6 (6) "Employee contributions" means contributions made to the individual account program
7 by an eligible employee under *[section 32, chapter 733, Oregon Laws 2003 (Enrolled HB 2020)]*
8 [ORS 238A.330](#), or on behalf of the employee under *[section 34, chapter 733, Oregon Laws*
9 *2003 (Enrolled HB 2020)]* [ORS 238A.335](#).

10 (7) "Member" has the same meaning given the term in *[section 1(10), chapter 733, Oregon*
11 *Laws 2003 (Enrolled HB 2020)]* [ORS 238A.005\(10\)](#).

12 (8) "Member account" means the account of a member of the individual account program.

13 (9) "Member of PERS" has the same meaning as "member" in ORS 238.005(12)(a), but
14 does not include retired members.

15 (10) "OPSRP" means the Oregon Public Service Retirement Plan.

16 (11) "Overtime" means the salary or hours, as applicable, that an employer has designated as
17 overtime.

18 (12) "PERS" means the retirement system established under ORS chapter 238.

19 (13)(a) "Qualifying position" means a position or positions in which an employee is
20 expected to perform 600 or more combined hours of service in a calendar year.

21 (b) If an employee is employed in a position or positions not designated as qualifying and
22 performs 600 or more total hours of service in a calendar year, the position or positions will be
23 considered qualifying and the employee shall be considered to have performed service in a

1 qualifying position from the date of employment or January 1 of the calendar year in which the
2 employee performed more than 600 hours of service, whichever is later.

3 (c) Except as provided in subsection (d) of this section, if an employee is employed in a
4 position or positions designated as qualifying and performs less than 600 hours of service in a
5 calendar year, the position will be considered non-qualifying from the date of employment or
6 January 1 of the calendar year in which the employee performed less than 600 hours of service,
7 whichever is later.

8 (d) For purposes of determining qualification upon initial employment in a position or
9 positions, but not for determining a break in service or any other purpose, if an employee is
10 employed in a position or positions for less than a full calendar year and performs less than 600
11 hours of service in that calendar year, but would have performed 600 hours of service or more if
12 the employee had performed service in the same position(s) for the full calendar year, and if the
13 employee performs 600 or more hours of service in the following calendar year, the position or
14 positions will be considered qualifying as of the date of employment.

15 **(e) For purposes of determining qualification upon separation from employment in**
16 **a position or positions, but not for any other purpose, if an employee was employed in a**
17 **position or positions for less than a full calendar year and performed less than 600 hours of**
18 **service in that calendar year, but would have performed 600 hours of service or more if the**
19 **employee had performed service in the same position or positions for the full calendar year,**
20 **and if the employee performed 600 or more hours of service in the previous calendar year,**
21 **the position or positions will be considered qualifying as of the date of separation.**

22 (14)(a) "Salary" has the same meaning given the term in *[section 1(16), chapter 733,*
23 *Oregon Laws 2003 (Enrolled HB 2020)]* **ORS 238A.005(16)**.

1 (b) Salary is considered earned when paid except as provided in subsection (c) of this
2 section and as otherwise provided in *[section 1(16)(b)(E), chapter 733, Oregon Laws 2003*
3 *(Enrolled HB 2020)]* [ORS 238A.005\(16\)\(b\)\(E\)](#).

4 (c) Salary is considered earned when earned for purposes of calculating final average salary.

5 (15) "School employee" has the meaning given the term in *[section 11(6), chapter 733,*
6 *Oregon Laws 2003 (Enrolled HB 2020)]* [ORS 238A.140\(6\)](#).

7 (16) "Service." Except as provided in subsection (c) of this section, a person is still
8 providing "service," for purposes of determining whether a "break in service" has occurred under
9 Section *[s 2 and 2a of chapter]* [2a, Chapter](#) 733, Oregon laws 2003 (Enrolled HB 2020), during
10 any calendar month that a member:

11 (a) Is in an employer/employee relationship; and

12 (b) Receives a payment of "salary," as that term is defined in ORS 238.005(20) or similar
13 payment from workers compensation or disability.

14 (c) A member who is a school employee will be considered to provide "service" during any
15 calendar month the institution is not normally in session so long as the member is in an
16 employer/employee relationship both before and after the period the institution is not normally in
17 session.

18 [\(17\) The provisions of this rule are effective on January 1, 2004.](#)

19 Stat. Auth.: *[OL 2003 Ch. 733]* [238A.450](#)

20 Stats. Implemented: *[OL 2003 Ch. 733]* [238A.005, 238A.025, 238A.140, 238A.330 and](#)
21 [238A.335.](#)



Oregon

Theodore R. Kulongoski, Governor

Public Employees Retirement System

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February 11, 2005

MEETING	2-18-05
DATE	
AGENDA	C.8.
ITEM	Legislative Update

TO: Members of the PERS Board
FROM: Steve Delaney, PERS Deputy Director
Tom Grimsley, PERS Board Member

SUBJECT: 2005 LEGISLATIVE UPDATE

PERS staff will provide an update regarding current legislative issues at each meeting of the PERS Board through conclusion of the 2005 session.

PERS BILLS

As of this morning, twenty bills have been introduced that directly relate to PERS. Ten new bills have been added to the bill matrix below:

1. **SB 302** Would limit terms of individuals serving on the Oregon Investment Council to no more than two four-year terms in any 12-year period.
2. **SB 497** Prohibits paying HB 3349 tax remedy if person is not state resident paying Oregon income tax.
3. **SB 499** Classifies telecommunicators as “police officers” for PERS purposes.
4. **SB 506** Classifies animal control officers as “police officers” for PERS purposes.
5. **SB 508** Expands types of jobs that qualify for exemption from hour limit for retired members returning to work for schools, education service districts, and community colleges.
6. **HB 2060** Allows community colleges to offer alternative retirement programs.
7. **HB 2434** Continues the payment of PERS contributions while a member is on temporary disability and in receipt of Workers Compensation benefits.
8. **HB 2436** Expands definition of covered salary to include payments made to a Health Savings Account.
9. **HB 5059** The PERS budget bill.
10. **HB 5060** As part of the PERS budget, this bill approves PERS collecting fees when a member requests more than two retirement estimates per year.

OTHER BILLS

Senate Bill 28 was removed from the matrix previously distributed. Even though that bill makes a minor change to ORS Chapter 238, it is really only relevant to a public employer seeking bonding authority and not to the benefit provisions of the PERS plan. PERS staff will continue to track both Senate Bills 23 and 28 as they attempt to clarify that the one percent cap on general governmental bonding authority and the five percent cap on governmental pension bonding authority are separate provisions, not cumulative.

Also removed from the matrix is Senate Bill 272. The Senate Judiciary Committee passed out the bill with a Dash-2 amendment removing all reference to PERS. That amended bill has been sent to the Senate floor.

Bill Numbers	Basic Concept
SB 54	A PERS Board Bill – Changes the trigger date for conversion to an Option 1 benefit from the date PERS is notified, to the date the event occurs.
SB 105	Modifies break in service rule. Provides that employee does not have break in service by reason of period of time during which employee leaves public employment because of injury or disease that entitles employee to receive service disability allowance. Provides that person who was inactive member on August 28, 2003, does not have break in service upon return to employment if person was on leave authorized by law or by employer and both person and employer anticipated that person would return to employment with employer upon completion of period of leave.
SB 108	A PERS Board Bill – Housekeeping measure pertaining to the interaction of PERS 238 and OPSRP 238A.
SB 109	A PERS Board Bill – Amends unclear statutory direction regarding interest earnings for estimated payments.
SB 110	A PERS Board Bill – Provides that withdrawal of an account invalidates any beneficiary notification on file with PERS.
SB 111	A PERS Board Bill – For tax qualification purposes, clarifies that PERS is a single plan with component parts.
SB 188	Modifies break in service rule governing membership in Oregon Public Service Retirement Plan by person who leaves public employment for more than six months. Provides that seasonal employee does not have break in service by reason of period of time during which employee leaves employment based on seasonal nature of employment. Declares emergency, effective on passage.

Bill Numbers	Basic Concept
SB 271	Provides that judge member of PERS who fails to make plan election be retired under Plan B. Allows judge to retire under Plan B if judge is at least 58 years of age and has at least 21.75 years of creditable service as judge. Modifies calculation of Plan B service retirement allowance. Increases maximum number of years of service using 3.75 multiplier under formula from 16 to 18. Declares emergency, effective on passage.
SB 302	Limits number of terms to which member of Oregon Investment Council may be appointed. Limits number of years a chairperson may serve. Requires sound recording be made of every meeting. Requires monthly meetings.
SB 497	Prohibits Public Employees Retirement Board from paying increased benefit by reason of state income taxation of payments made by board if person receiving payments is not resident of state and does not pay Oregon income tax. Provides procedures for enforcing prohibition. Imposes similar prohibition for certain public employers that provide retirement benefits for police officers and firefighters other than by participation in Public Employees Retirement System. Declares emergency, effective on passage.
SB 499	Classifies telecommunicators certified by Department of Public Safety Standards and Training as police officers for purposes of benefits under Public Employees Retirement System. Applies to all service rendered by telecommunicator, whether rendered before, on or after effective date of Act, if person is employed as telecommunicator on effective date of Act.
SB 506	Classifies dog control officers and persons commissioned by sheriff to perform animal control duties as police officers for purposes of benefits under Public Employees Retirement System. Applies to all service in position, whether rendered before, on or after effective date of Act, if person is employed in position on effective date of Act.
SB 508	Removes limit on number of hours retired member may work and still qualify for retirement under Public Employees Retirement System if retired member is employed by school district or education service district as other than teacher or management employee, or by community college as other than faculty member or management employee. Applies to Oregon Public Service Retirement Plan.

Bill Numbers	Basic Concept
HB 2060	Authorizes community college districts to offer alternative retirement programs.
HB 2104	Modifies provisions governing Optional Retirement Plan established by State Board of Higher Education. Provides that employer contribution rate for plan be based on employer contributions to PERS without adjustment for lump sum payments to system by employers. Establishes procedures for employees who are members of Oregon Public Service Retirement Plan and who elect to become members of Optional Retirement Plan.
HB 2189	Provides that salary used to determine benefits of members of PERS includes wages of deceased member paid to spouse or dependent children.
HB 2434	Requires that employer of Tier One or Tier Two members continue to make contributions for member as though member continued to work during period in which member receives temporary total disability benefits under Workers' Compensation Law. Provides that contributions be based on salary of member at time member left work. Provides that final average salary of member be calculated as though member continued to work during period of temporary total disability, based on salary of member at time member left work.
HB 2436	Expands definition of 'salary' for purposes of benefits under Public Employees Retirement System. Provides that salary includes amounts contributed by employee to Health Savings Account or Health Reimbursement Arrangement.
HB 5059	The PERS FY 2005-07 budget bill.
HB 5060	Approves new or increased fee adopted by Public Employees Retirement Board.

THE BOARD AND THE LEGISLATURE

In 2003 the Oregon Legislature clarified the relationship between the Legislature and the PERS Board with the passage of HB 2020, codified in ORS 238.660(9):

“The board may review legislative proposals for changes in the benefits provided under this chapter and ORS chapter 238A and may make recommendations to committees of the Legislative Assembly on those proposed changes. In making recommendations under this subsection, the board acts as a policy advisor to the Legislative Assembly and not as a fiduciary. In making recommendations under this subsection on the Oregon Public Service Retirement Plan established by ORS chapter 238A, the board shall seek to

maintain the balance between benefits and costs, and the relative risk borne by employers and employees with respect to investment performance, reflected in ORS chapter 238A as in effect on January 1, 2004.”

In turn, to assist the PERS Board in reviewing PERS-related legislative concepts, the Oregon Legislature also approved the creation of a permanent advisory committee made up of PERS plan stakeholders, to provide the PERS Board with comment and recommendations.

LEGISLATIVE DECISION MATRIX

On January 7, 2005 the PERS Board adopted a decision matrix that provides in broad-brush strokes the general parameters the Board would use in making decisions regarding bill positions. The matrix is only suggestive of likely Board positions; it is not binding upon the Board.

The decision matrix is attached for possible further consideration by the Board.

PERS BOARD DECISION MATRIX: LEGISLATIVE POSITIONS

MEETING	2-18-05
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ITEM	attachment

This decision matrix is only suggestive of likely Board positions and is not binding upon the Board for any specific legislative proposal. The Board approved the document at its January 7, 2005 meeting.

BILL TOPIC	BOARD POSITION
Administration of Plan - All aspects	The Board will take a position as appropriate with regard to proposed administrative changes; consideration will include the possible workload impact upon PERS staff.
Benefits - Adequacy, amount, size	The Board generally does not take a position with regard to appropriate benefit levels, which is a legislative prerogative. The Board will provide factual information regarding the impact of proposed bills on member benefits, employer rates, and system funding as part of its fiscal impact analysis.
Benefits - Plan Structure (i.e. vesting, benefit factor, FAS, payment options)	The Board will take a position as appropriate with regard to proposals to change plan structure. Specifically, while plan structure is a legislative prerogative, the Board will look to legislative intent and will determine if a proposal accomplishes the intent and if there are any administrative impacts, and will take a position accordingly.
Membership - PERS eligibility - Coverage status - Classification (i.e. P&F)	As membership issues affect benefits, the Board generally does not take a position with regard to membership issues, which is a legislative prerogative. The Board will provide factual information regarding the impact of proposed bills on membership rights, impact on member benefits, employer contribution rates and system funding as part of its fiscal impact analysis.
PERS Board - Authority - Functions	The PERS Board as trustee of the Public Employees Retirement System has fiduciary duties and will take a position as appropriate with regard to bill proposals impacting the PERS Board and its ability to fulfill those responsibilities.
PERS Board - Membership (i.e. number, representation)	The PERS Board generally does not take a position with regard to membership or representation on the PERS Board, which is a legislative prerogative.
PERS Fund - All aspects	The PERS Board as a trustee of the Public Employees Retirement Fund has fiduciary duties and will take a position as appropriate with regard to bill proposals impacting the PERS Fund.
Tax Qualification of Plan - All aspects	The PERS Board is required by Oregon Revised Statute (ORS 238.630(3)(g)) to maintain the tax qualification of the plan, and will take a position as appropriate with regard to bill proposals impacting the plan's tax qualification status. It is possible that a bill initially falling within the policy scope of a prior topical area above (such as <i>Benefits</i>) may actually require a PERS Board position because of impact on the tax qualification status of the PERS plan.