

Memorandum

TO: Dick Warbrouck
FROM: Phil Talmadge
DATE: May 2, 2011
RE: House Bill 2097

Dick:

I had an opportunity to review House Bill 2097, although I have not yet engaged in detailed legal research regarding its contents.

On the surface, the bill accomplishes two large changes in present law. First, the bill eliminates the Law Enforcement and Firefighters retirement system ("LEOFF") Plan I and merges it into a single LEOFF system. The unified LEOFF system is managed by a single state-wide board, as described in Section 6 of HB 2097. Similarly, the two separate LEOFF Plan I and Plan II retirement funds are combined into a single fund. Section 4(1).

Second, the legislation restores employee, employer, and state contributions to LEOFF. Section 1 of the bill restores contributions by LEOFF Plan II members and employers in the 2011-13 biennium. Contributions by Plan I employers and employees are restored effective July 1, 2013 and the rates of such contributions will be set by the new unified LEOFF board. Section 3(2).

From my cursory review of HB 2097, there are several very interesting implications of the bill. First, the bill's intent is plainly fiscal. LEOFF Plan I is presently running a small surplus. That surplus will exist probably through the end of the 2011-2013 biennium, according to State Actuary Matt Smith's Preliminary Risk Analysis dated April 18, 2011. That surplus becomes available to allow the Legislature to diminish general fund contributions to LEOFF Plan II. The revenues from the new contributions by Plan II members, employers, and the State (sec. 1 of HB 2097) and the LEOFF Plan I surplus will allow the Legislature to reduce general fund appropriations to LEOFF in the 2011-13 biennium. The Plan II contribution rates, particularly the State's, will be lower than otherwise required because of the seizure of the Plan I surplus. Ironically, for the future, the Actuary indicates that LEOFF Plan I will start to run a deficit. If that assessment is true, the combination of LEOFF Plan I and LEOFF Plan II will not benefit biennial budgets after 2013.

Second, left unaddressed in this legislation is the question of how the new unified LEOFF board will interact with local LEOFF Plan I boards. The legislation does not specifically repeal the statutory authority of local LEOFF boards. As you know, those local LEOFF boards have authority to award additional medical benefits for LEOFF Plan I retirees. Those local LEOFF boards have historically authorized such additional benefits as dental, vision, and even the payment of Medicare contributions for LEOFF Plan I retirees. If the intent of the Legislature is to eliminate the authority of local boards to act and to place control of the LEOFF

in the new unified LEOFF board, there is an important question as to whether these benefits will persist or whether the unified LEOFF board will eliminate them. Plainly, if the LEOFF system generally has financial difficulties, there is a major incentive for the new unified board, consisting virtually entirely of LEOFF Plan II members, to eliminate benefits for the older retirees of LEOFF Plan I to hold down costs and to keep contributions by LEOFF Plan II members lower and retain the maximum benefits for LEOFF Plan II members. This raises an interesting question under *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), which treats pensions as contracts and severely curtails the ability of the Legislature as a matter of constitutional law to impair them. Many LEOFF Plan I members, as you know, argue that the board structure itself is a benefit that has become, in effect, a contractual right of the LEOFF Plan I members. Would the potential elimination of these locally-authorized benefits constitute an impairment of the contractual agreement under which the LEOFF Plan I retirees retired?

Finally, the elimination of the LEOFF Plan I board and the creation of a unified LEOFF board is an important issue in HB 2097. The new unified LEOFF board contains a disproportionate number of LEOFF Plan II members to LEOFF Plan I members. It is highly likely that the board would be disposed to increase rates significantly for LEOFF Plan I members and diminish benefits that those members have. This is something of a due process/"taxation without representation" question. This is particularly important where the Legislature has delegated rate-setting authority to an unelected board. Arguably, the creation of a state wide board that control over LEOFF Plan I retirees and actives could impair the contractual agreement with LEOFF Plan I members, again invoking *Bakenhus* concerns.

If you require further analysis from me in connection with the provisions of HB 2097, please do not hesitate to let me know. I hope this quick analysis is helpful as you engage in further discussion with legislators and legislative staff regarding the ramifications of HB 2097.