

MEMORANDUM

October 17, 2008


TO: Members of the City Council
FROM: Mayor Dave Enslow
RE: Request for Information about Fire Pensions

I am enclosing a copy of Diane's exhaustive memo designed to thoroughly describe the pension issue and originally sent to the Council March 27, 2008. Since I never heard back from anyone, I am assuming it answered the pertinent questions. Please feel free to contact me should you desire anything further.

MEMORANDUM

March 27, 2008

TO: Members of the City Council

FROM: Diane Supler, Deputy City Administrator 
Beth Anne Wroe, Financial Operations Director

RE: **Firemen's Pension Liability**

We would like to take this opportunity to provide you with information regarding the City's financial responsibility to its retired firefighters.

Chapter 41.18 RCW, the Firemen's relief and pensions act of 1955 (retirement system), provided benefits to firefighters of cities, towns, and fire protection districts prior to the creation of the Washington law enforcement officers' and firefighters' retirement system, known as LEOFF, that went into effect on March 1, 1970. Firefighters who were covered by systems in prior acts such as RCW 41.18 had the option of having their membership transferred to LEOFF or remain under the provisions of RCW 41.18.

The City is responsible for a number of costs associated with Firefighters' benefits. These are the guaranteed pension benefits (payable to anyone who was a member on March 1, 1970), and full retiree medical and long-term care benefits (payable to anyone who was a member in LEOFF prior to October 1, 1977). Note that the group eligible for medical and long-term care coverage is generally larger than the group eligible for pension benefits.

The City is responsible for the entire pension benefit for members retired before March 1, 1970. For members active on March 1, 1970, the City is liable for an excess pension benefit. The excess pension benefit is the difference between a member's retirement pension benefit calculated under Firemen's Pension Fund (FPF) and the member's benefit calculated under LEOFF, but not less than zero. The City is responsible for paying this difference to Plan members. Over time, the FPF benefit increases with active salaries while the LEOFF benefit increases with the Consumer Price Index.

The City is also responsible for 100% of the medical care for the lifetimes for certain employees. When deemed medically necessary long-term care expenses fall within this entitlement.

The City of Sumner currently has 2 retired firefighters and 1 widow (survivor) which qualify for guaranteed pension benefits. Of this group only the 2 retired firefighters qualify for the full retiree medical and long-term care benefits. In addition to these 2

firefighters there are 3 additional firefighters and 4 law enforcement officers who qualify for the full retiree medical and long-term care benefits.

Now let's go back to the pension issue for the retired firefighters and the widow (survivor). Why compare the Pre-LEOFF system benefits to the LEOFF system benefits received?

1. The supreme court of the State of Washington in the 1956 decision *Bakenhus v. City of Seattle* established that firefighters and police officers, active and retired, have a constitutionally protected contractual right to retirement benefits of the pension acts which they have contributed to as members of the system.
2. Therefore, members employed prior to March 1, 1970 and continuing employment after March 1, 1970 have the rights to benefits from RCW 41.16, 41.18 and 41.26.

Based on the above the City of Sumner is required to perform a calculation to determine the City's share of pension benefits to be paid to its retirees and the widow (survivor). Steps to perform the calculation are:

1. Determine the applicable benefit from the prior governing act – RCW 41.18.
2. Apply the appropriate benefit increase (if any) to determine full amount of benefit.
3. Check the benefit being paid by the State of Washington under RCW 41.26.
4. If the amount of benefit payable by the previous act is more than the amount being paid by the State of Washington under RCW 41.26, then the employer is responsible for paying the member the difference between the RCW 41.26 benefit and the benefit owed under the prior act (RCW 41.18).

The current state law does not directly address nor does it appear to have contemplated the consolidation of fire departments. As a result, staff has invested considerable time researching alternatives and corresponding with some of the retirees. Preliminary numbers indicate that if we are to use the salaries of East Pierce Fire and Rescue the additional compensation would be in the range of \$19,000 to \$35,000 for the three eligible retirees. The City was not aware of the need for this additional compensation at the time the City of Sumner entered into the contract with East Pierce. This issue was brought to the attention of the Finance Department late last summer and we have been corresponding with a number of state agencies as well as a number of other cities.

Another important component to performing the benefit calculation is the determination of basic salary. At this point we had more questions than answers. In order to move forward we sought assistance from our Legal Department with help in answering the following questions:

- 1. Should a retired Fire Chief's retirement benefits be calculated based on a battalion chief's salary rather than that of a fire chief and how is the retirement benefit calculated?**

RCW 41.18.040 provides that a firefighter is entitled to a monthly pension upon retirement "equal to fifty percent of the basic salary now or hereafter attached to

the same rank and status held by the said fire [fighter] at the date of his or her retirement". This is referred to as a "fluctuating pension" because it may change in order to maintain a proportionate relationship to current salary levels. *Bates v. City of Richland*, 112 Wn.App 919,929, 51 P.3d 816 (2002). A fluctuating pension is calculated based upon the basic salary of currently employed firefighters holding the same position as the retiree held at the time of retirement. See *Bates*, 112 Wn.App. at 933-34; see also AGO 1992 No. 24 ("fluctuating pensions should reflect structural changes made in the salary schedule after retirement if the retirees would have benefited from the change had they continued working"). Basic salary is defined in RCW 41.18.010 as follows:

(4) "Basic salary" means the basic monthly salary, including longevity pay, attached to the rank held by the retired fireman at the date of his retirement, PROVIDED, That such basic salary shall not be deemed to exceed the salary of a battalion chief.

In reference to the AGO 1992 No. 24 the *Bates* Court stated:

We agree, but we also note that the Attorney General's conclusions rest on the assumption that the positions are defined such that a comparison is possible. The Pensioners here are entitled to receive a fluctuating pension based on the "salary at any time hereafter attached to the position held by the retired member for the year preceding the date of his retirement." See RCW 41.20.050, .060. Additionally, under Washington law, the definition of "salary" contains limitations that are applicable when calculating pensions. Keeping these limitations in mind, we must examine Richland's performance-based system to determine, (1) whether the new system is defined such that the current counterpart for each Pensioner's position can be determined and, if so, (2) which portions of that position's salary may be included in the calculation of the Pensioners' pension. (emphasis added) *Bates v. City of Richland supra at 935*.

Since the City of Sumner never had a Battalion Chief Position there is no equivalence when compared with East Pierce County Fire District (EPCFD); therefore, the pension should be calculated in accordance with RCW 41.18.040 which provides that a firefighter is entitled to a monthly pension upon retirement "equal to fifty percent of the basic salary now or hereafter attached to the same rank and status held by the said fire [fighter] at the date of his or her retirement," but is capped when it reaches a battalion chief's salary.

2. **The City may be required to use East Pierce Fire District salaries for purposes of calculating pension benefits for its retirees.**

A fluctuating pension is calculated based upon the basic salary of currently employed firefighters holding the same position as the retiree held at the time of retirement. See *Bates v. City of Richland*, 112 Wn.App 919,929,51 P.3d 816 (202); Additionally, in a 1992 Attorney General Opinion it has been noted that "fluctuating pensions should reflect structural changes made in the salary

schedule after retirement if the retirees would have benefited from the change had they continued working”. AGO 1992 No. 24.

The issue before the City is since it no longer has a fire department how is the calculation determined and to which entity should it look for comparison? One alternative would be to tie the calculations to “comparable cities,” similar to the way salaries are determined during contract negotiations. This would benefit the City as it more accurately reflects the costs that similar sized cities are facing. However, while it is a benefit to the City it may be argued that such benefit is a detriment to the retired LEOFF retirees. The LEOFF retirees will likely argue that had calculation benefits should be tied to East Pierce Fire District (EPFD) as it is more advantageous monetarily to them. Additionally, they would likely argue that in accordance with the AGO Opinion and the *Bates* decision that the City afford them the same as if they “had continued working”. Further support of this argument may come from the fact that other jurisdictions facing the same or similar issue as the City have tied salaries to the “annexing agency”.

However, in reference to the AGO 1992 No. 24 the *Bates* Court stated:
We agree, but we also note that the Attorney General’s conclusions rest on the assumption that the positions are defined such that a comparison is possible. The Pensioners here are entitled to receive a fluctuating pension based on the “salary at any time hereafter attached to the position held by the retired member for the year preceding the date of his retirement.” See RCW 41.20.050, .060. Additionally, under Washington law, the definition of “salary” contains limitations that are applicable when calculating pensions. Keeping these limitations in mind, we must examine Richland’s performance-based system to determine, (1) whether the new system is defined such that the current counterpart for each Pensioner’s position can be determined and, if so, (2) which portions of that position’s salary may be included in the calculation of the Pensioners’ pension. (emphasis added) *Bates v. City of Richland supra at 935*.

Since the City of Sumner never had a Battalion Chief Position there is no equivalent when compared to the East Pierce Fire District. Arguably, RCW 41.18.040 which provides that a firefighter is entitled to a monthly pension upon retirement “equal to fifty percent of the basic salary now or hereafter attached to **the same rank and status** held by the said fire [fighter] at the date of his or her retirement”. This law allows the City to not only look at rank but also “status” of the retiree. Arguably, the City could then look at job descriptions and attempt to make comparisons that differentiate between rank and status of the positions when the individuals retired as compared to the positions in whatever agency is finally determined to be appropriate. However, courts have generally looked at making decisions in this type of context that are most favorable to the employee or retiree.

Therefore, the City may be able to contact the retirees to see if they would agree to a “comparable City” analysis. However, if pushed, it is possible that a court

would require the City to use EPFD salaries. We have not yet contacted any of affected individuals at this time and currently working with the City Attorney on appropriate steps and actions to take in this matter.

It is important to note the City owes pension benefit payments for the time it did have a fire department. We have calculated this amount for the period ending December 31, 2006 and the City owes \$53,456.95 plus interest for a total of \$55,121.87. As you will recall we brought forward a budget amendment in December 2007 to fund these back pension benefit payments out of Fund 611 Firemen's Pension Fund. Unfortunately, due to the number of outstanding issues the payments did not get completed in 2007 and now need to be completed in 2008. We will be bringing a request to you to amend the 2008 budget for these payments.

In addition as discussed we are still working on determining the amount of pension benefit payments due to retirees for 2007 and 2008. We anticipate providing the City Council recommendations within the next 30 days.