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Mr. Aaron Gutierrez
Office of the State Actuary
M/S: 40914
Olympia, WA 98504-0914

RE: **Proposed Legislation for LEOFF I / LEOFF II Merger/Consolidation**

Dear Mr. Gutierrez:

You have asked our office to comment on state legal issues concerning the LEOFF I and LEOFF II merger study now being performed by the Office of the State Actuary. At this stage of the proceedings, we can give only generalized comments given that there is no specific legislation currently available for review. In addition, some of the issues that possibly may be raised in the merger involve legal issues that currently the Office of the Attorney General is in the process of litigating in other pension system-related lawsuits (Gain Sharing and Uniform COLA) and we cannot render opinions on issues that may have an unforeseen impact on the pending litigation.

Suffice it to say, if history is any guide, mergers and consolidations of pension plans are legal methods in this state for managing and operating a pension system. In 1969, ESSB No. 74 was passed by the Legislature establishing the LEOFF I pension system. The new system was designed to cover law enforcement and firefighters who were already employed in such capacities as of March 1, 1970, as well persons newly employed therein after that date. Most of these people were already participating in one of several preexisting public employees' pension systems which had been established by previous Legislatures; for example, the Washington public employees system, RCW 41.40; the state-wide city retirement system, RCW 41.44 (which itself was merged into the Washington public employees, RCW 41.40, on January 1,1972); the pension system for volunteer firefighters, RCW 41.24; the municipally operated pension systems for paid firefighters, RCW 41.16 and RCW 41.18; and finally, the pension systems for first class city police officers, RCW 41.20. Pursuant to court precedent which I will discuss later on, the Legislature, in transferring these individuals to the new LEOFF system, made provision for the preservation of "vested rights" which these persons had already acquired based on their past service in the aforementioned retirement systems. In particular, the Legislature, in the codification of the 1969 LEOFF Act, said in RCW 41.26.040(2) that there would be no reduction in benefits. If there were any excess benefits computed to be due under the old systems, then those payments were to be made by the old systems to the employees. There were no general

legal challenges to the LEOFF creation based on the vested rights doctrine which, as outlined above, the Legislature was careful not to transgress.

Any merger or consolidation involving public employee pension rights must not violate the "vested rights" doctrine announced in the seminal case of *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 701, 296 P.2d 536 (1956). In that case, the Washington Supreme Court stated:

> [T]he employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions. His pension rights may be modified prior to retirement, but only for the purpose of keeping the pension system flexible and maintaining its integrity.

Of course, it well known that there has been a vast amount of litigation over the past 50 years concerning just what changes can be made to a state pension system that does not run afoul of the *Bakenhus* test. The problem lies in the fact that while pension statutes are not in themselves contracts, they may provide the right to receive certain benefits that constitute deferred compensation for services rendered. *Noah v. State*, 112 Wn.2d 841, 774 P.2d 516 (1989). The vested rights to these pension benefits are thus often protected from subsequent impairment. This vesting as explained in *Noah* refers to "the contractual right to a pension substantially in accord with the statutes as they existed when the employee begins service." The substance of constitutional protection granted by *Bakenhus* would mandate that the results of any merger or consolidation of the LEOFF I and II Plans would (1) uphold the reasonable expectations of the member or beneficiary and (2) not be seen as a reneging on the promise originally made to the members when they joined the pension system.

Whether this issue comes down to a merger of LEOFF I into LEOFF II, a merger of LEOFF II into LEOFF I, a consolidation of both plans into a new entity, or some other statutory scheme to combine the systems, it is clear that initially there is constitutional authority for the Legislature to bring the systems together. However, as we preliminarily indicated at the beginning of this memorandum, without the exact language of a draft proposal for legislation, we cannot give any definitive answers as to the legality of such a plan to combine the present systems.

I hope this letter will be of assistance to you. The analysis and opinion provided herein is my own and is not an official opinion of the Attorney General or this office.

Sincerely,

Kyle J. Crews

KYLE J. CREWS
Assistant Attorney General