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LEOFF I Coalition Board
Attention Mark Curtis, V.P.
855 Trosper Road, #108-27
Olympia, WA. 98512-8108

VIA EMAIL AND
FIRST CLASS MAIL

RE: Analysis of House Bill 2350

Dear LEOFF I Coalition Chair and Board Members:

By email of January 10, 2012, you have asked that I analyze what has become HB 2350, the latest attempt to merge Plan 1 and Plan 2 of the Washington Law Enforcement Officers and Fire Fighters Retirement System. I have reviewed the Bill in considerable detail and will present my views in the paragraphs that follow.

OVERVIEW

By way of an overview, let me say that this Bill is no less insidious and harmful to LEOFF I members than was HB 2097. Although it is, in many respects, quite similar to HB 2097, there are a few significant differences. The present Bill, HB 2350, is likely to appear to the casual reader as quite a bit better than HB 2097; however, in reality, it is not. I can find nothing to recommend it to LEOFF I members. In the next few paragraphs I will discuss a few of my concerns and call to your attention some of the sections which you may wish to consider carefully.

SECTION 1

Subsection (1) of Section 1 merely sets the contribution rates retroactively for the biennium, from July 1, 2011 through June 30, 2013. The second paragraph, however, Subsection (2) of Section 1 contains language

that suggests that the contribution rates can be raised to reflect the cost of "additional benefits." More about this in later paragraphs.

SECTION 3

Very little needs to be said about Section 3 of the Bill. A point of clarification should be mentioned, however. In Subsection (1)(a) of Section 3 the term "member" should be changed to read either "active member" or "employee" to avoid any confusion. Pensions received by LEOFF I members have been held by our courts to constitute "deferred compensation." The change that I have suggested would make it clear that no money is to be withheld from the pensions of retired members, and that contributions are to be deducted only from the compensation of *active* members.

SECTION 5

As you know, LEOFF I members receive medical benefits from two sources under the Act. The first is RCW 41.26.030(19) which enumerates a laundry list of healthcare services which are mandatory in nature, and are clearly contractual, and therefore, come under the protection of *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (Wash. 1956). The second source of healthcare benefits enjoyed by LEOFF I members is the designation of additional medical services by local Disability Boards. These additional medical services may be regulated and controlled by the Disability Board having jurisdiction over the member. One responsibility of each Disability Board is to oversee the provision of all healthcare services received by LEOFF I members, whether received under RCW 41.26.030(19) or under RCW 41.26.150(1)(b), and to approve the payment for such healthcare services.

At first glance, this new section would appear to preserve the present system of providing healthcare benefits to LEOFF I members, but on a closer reading, one realizes that there is no provision in this section, or in any other section of the Bill for that matter, which would preserve local Disability Boards to administer these healthcare benefits. Since the first sentence of this section makes it clear that Plan 1 is being merged ***into*** Plan 2, and because of other language in the Bill, it would appear that the administration of all benefits, including the healthcare benefits for LEOFF I members are to be handled by the LEOFF II Board. In the event that this Bill goes much further toward becoming a law, you should have me research the

constitutional aspects of the Bill, and whether this provision would violate *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (Wash. 1956).

Local Disability Boards would appear to have no further purpose under this Bill. Certainly there would be no way for a Disability Board to designate additional healthcare benefits for LEOFF I members. Judging from the composition of the Board of Trustees as set forth in Section 7 of the Bill, I think that the likelihood of a subsequent grant of additional healthcare benefits is highly unlikely. The other question is exactly how the Board of trustees is expected to manage the administration of healthcare benefits for LEOFF I members that are presently administered by scores of local Disability Boards, especially when the additional medical services these Boards grant the members under their jurisdiction are so very different for each Board and group of members. This provision has the makings of a complete disaster.

SECTION 6

Section 6 is a definitional section. Definitions contained in a Bill or a Statute are extremely important, and must be read very carefully. You will note that, while the previous section seems to say that LEOFF I members retail all benefits, including healthcare benefits, that they enjoyed before the merger, the present section contradicts that notion and confuses the issue.

Subsection (8) of Section 6 creates a category of benefits called "minimum benefits" which it defines as "those benefits provided for in chapter 41.26 RCW as of July 1, 2003." Subsection (11) of Section 6 creates a second category of benefits which it calls "increased benefits" which the section defines as "a benefit in addition to the minimum benefits." From these two subsections it would appear, with regard to healthcare benefits, that a distinction must be drawn between those medical benefits granted by a particular Disability Board on of before July 1, 2003 and those granted by each Disability Board subsequent to that date. The former will be "minimum benefits," while the latter will constitute "increased benefits." This is an important distinction as we will see as we read further into this Bill.

Before leaving Section 6, we should also look at Subsection 13 of Section 6 which is more than just a little confusing. That subsection reads, in part, as follows:

> (13) "Benefits" means the age or service or combination thereof required for retirement, the level of service and disability retirement benefits, survivorship benefits, payment options including a deferred retirement option plan, average final compensation, *postretirement cost-of-living adjustments,* ***including*** *health care and the elements of compensation.* (Emphasis provided)

I have no idea what the word "including" means in this context. It appears to be trying to include healthcare benefits and "elements of compensation" as a part of cost of living adjustments. If the word "including" were struck fron the section it would work better.

SECTION 7

The interesting thing about Section 7 is that the police and fire fighter members of the Board of Trustees can all be Plan 2 members. Certainly the Bill would allow the appointment of one or more Plan 1 members to the Board of Trustees, but there is no requirement that even a single Plan 1 member be on the Board of Trustees. Given the vast differences between Plan 1 and Plan 2 members with regard to the nature and level of benefits enjoyed by each group; and given the increased level of disharmony that exists between them, especially after last years introduction of HB 2097; it seems unlikely that LEOFF I members will get a fair shake from the Board of Trustees. Even if the Board of Trustees does its best to treat active and retired Plan 1 members fairly, the confusion and problems discussed in the preceding section of this letter will make it all bet impossible. Local Disability Boards MUST be kept in place to administer the benefits that they presently administer for LEOFF I members.

To the extent that local Disability Boards are being eliminated by this Bill, and in the event that this Bill goes much further toward becoming a law, you should have me research the constitutional aspects of the Bill, and whether or not this elimination of Disability Boards violates the rule of *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (Wash. 1956).

SECTION 9

This section sets out a number of powers and duties of the Board of Trustees. Subsection (1)(b)(i) provides a very complex way in which the

Board of Trustees may, should it choose to, provide increased benefits. It specifically provides as follows:

> (b)(i) Provide for the design and implementation of increased benefits for members and beneficiaries of the plan, *subject to the contribution limitations under RCW 41.26.725*. An increased benefit may not be approved by the board until an actuarial cost of the benefit has been determined by the actuary and contribution rates adjusted as may be required to maintain the plan on a sound actuarial basis. *Increased benefits as approved by the board shall be presented to the legislature* on January 1st of each year. The increased benefits as approved by the board shall become effective within ninety days unless a bill is enacted in the next ensuing session of the legislature, by majority vote of each house of the legislature, repealing the action of the board;

Given the complexity of this, I wonder if any "increased benefits" will ever make it to the members who need them. At present, as you know the matter of increasing provided healthcare services for members is within the discretion of the various local Disability Boards, and is accomplished quite simply by a vote of the Board. I would be very surprised to ever see any increase in discretionary healthcare benefits for those who are presently Plan 1 members, especially since the merging of the two plans would, for all practical purposes, require any such increased benefits to apply not only to the relatively few remaining Plan 1 members, but to all LEOFF members, Plan 1 and Plan 2, alike.

Subsection (b)(ii) of Section 9 is poorly written and too confusing to understand just what it is trying to accomplish, or to predict just what problems it will cause or solve.

Subsection (d) of Section 9 empowers the Board of Trustees to "consult with the department for the purposes of improving benefit administration and member services. It would seem that local Disability Boards are out of the picture, as they seem to have no more responsibility under this Bill. Once again, this is an area which will require some additional research if it appears that this Bill is moving ahead with any momentum.

SECTION 10

Section 10 of the Bill deserves some careful scrutiny. It is fraught with potential problems. Subsection (1) of Section 10 reads as follows:

> (1) The board of trustees shall establish contributions as set forth in this section. The cost of the ((~~minimum benefits as defined in this plan~~)) combined plan 1 and plan 2 benefits shall be funded on the following ratio:
>
> Employee contributions 50%
> Employer contributions 30%
> State contributions 20%

My question with regard to this subsection is be whether its intent is to require LEOFF I members to pay 50% of the cost of their healthcare benefits. I doubt that this is the intent, but the Subsection is certainly not clear at all. It should be clarified with specific language so as to avoid any question in this regard.

Subsection (2) of Section 10 of the Bill reads, in part, as follows:

> (2) The minimum benefits shall constitute a contractual obligation of the state and the contributing employers and may not be reduced below the levels in effect on July 1, 2003. (Emphasis added).

While safeguarding the contractual nature of the "minimum benefits (those in effect on or before July 1, 2003) the subsection would seem to be suggesting that the additional benefits acquired after that date are not contractual in nature and may be reduced or eliminated all together. The question, of course, is what does this mean for those additional medical and healthcare services designated by our local Disability Boards as available to LEOFF I members after July 1, 2003. In most cases, this will include dental benefits and other healthcare procedures not approved by Disability Boards as of July 1, 2003.

Subsection (3) of Section 10 of the Bill is also somewhat unclear, and appears to present some problems. It reads, in part, as follows:

> (3) Increased benefits created as provided for in RCW 41.26.720 are granted on a basis not to exceed the contributions provided for in this section. **In addition to** the contributions necessary to maintain the minimum benefits, for any increased benefits provided for by the board, the employee contribution shall not exceed fifty percent of the actuarial cost of the benefit. In no instance shall the employee cost exceed ten percent of covered payroll without the consent of a majority of the affected employees. Employer contributions shall not exceed thirty percent of the cost, but in no instance shall the employer contribution exceed six percent of covered payroll. State contributions shall not exceed twenty percent of the cost, but in no instance shall the state contribution exceed four percent of covered payroll. Employer contributions may not be increased above the maximum under this section without the consent of the governing body of the employer. State contributions may not be increased above the maximum provided for in this section without the consent of the legislature. In the event that the cost of maintaining the increased benefits on a sound actuarial basis exceeds the aggregate contributions provided for in this section, the board shall submit to the affected members of the plan the option of paying the increased costs or of having the increased benefits reduced to a level sufficient to be maintained by the aggregate contributions. The reduction of benefits in accordance with this section shall not be deemed a violation of the contractual rights of the members, provided that no reduction may result in benefits being lower than the level of the minimum benefits.

This subsection may be read as requiring members to pay 50% of the cost of any "increased benefits." Given the fact that an "increased benefit" is defined as "a benefit in addition to the minimum benefits," and the term "minimum benefits" is defined as "those benefits provided for in chapter 41.26 RCW as of July 1, 2003;" LEOFF I members could be required to pay 50% of the cost of all healthcare benefits granted them by their local Disability Board after July 1, 2003. I do not believe that such is the intention of this section of the Bill; however, it is a possible, and even likely reading of this section of the bill.

Also of note is the provision in this subsection that provides that anytime that the cost of maintaining increased benefits exceeds the existing

contribution levels, the Board of Trustees must submit to the members the option of paying for the benefits or having them reduced. The subsection also specifically provides that any such reduction in benefits is not to be construed as a violation of the contractual rights of members.

SECTION 18

subsection (2) of Section 18 of the bill requires the Department of Retirement Systems to: "establish supplemental rates to pay for the cost of additional benefits, if any, granted to members of the law enforcement officers' and firefighters' retirement system." While the Department has that mandate now as to Plan 2 members, this section extends that requirement to include Plan 1 members. It should be noted that the term used in this section is "additional benefits," a term not previously defined. I suspect that it is an oversight, and that "increased benefits" is the intended term.

SECTION 19

Subsections (1) and (2) of Section 19 would seem to divest the Public Safety Subcommittee and the Select Committee on Pension Policy of their oversight of the Law Enforcement Officers and Fire Fighters Retirement System, in favor of to Board of Trustees as constituted by this Bill.

SECTION 20

Although not of overwhelming importance, Subsection (2) of Section 20 provides that all legal expenses and litigation costs incurred primarily in the protection of the fund or incurred in compliance with the statutes governing the fund are to be paid from the interest earnings of the fund – your money.

While I believe that the sections discussed above are the only ones that need to be discussed at this time, I do believe that it will be necessary to watch this Bill carefully for changes and for its progress toward becoming the law of the land.

In the event that this Bill moves along to the point that it is likely to become law, you should again retain me to research the various issues relating to the constitutionality of the various provisions that are problematic for LEOFF I members, so that we can stay ahead of the State on that issue. I do not see any need to spend the time and money for such research at this time, since we do not know how far this Bill will get. I will remain ready to

conduct any such legal research and analysis as the LEOFF I Coalition and its Board deems appropriate.

The discussions set forth in this letter should give you a very good idea of what provisions of the Bill are of the most concern, and also give you some talking points for discussions with legislators about the problems with this piece of legislation.

Thank you for allowing me to be of service.

Very truly yours,

J.E. Fischnaller