Opinion No. 2013-030

May 30, 2013

The Honorable Tommy Thompson
State Representative
15 Ashley Drive
Morrilton, Arkansas 72110-2287

Dear Representative Thompson:

I am writing in response to your request, tendered on behalf of the City of Morrilton, for my opinion relating to what you identify as "the Local Volunteer Fireman's Pension fund." You report the following regarding the local fund:

> That according to the last review was insolvent. The following questions are in regards to Arkansas Local Police and Fire Retirement System § 24-10. All of the questions refer to benefits not yet authorized by the local board.

Against this backdrop, you have posed the following questions:

1. A.C.A. § 24-10-607 says that the "rank of a member" as [sic] how to calculate final pay. Is the final pay for participants just for the rank or would it also include such things as extra pay for teaching or being a fire inspector, which is part of their recurring salary paid by the department? AG Opinion 2001-265 Question 5 seems to say that if it is a line item in General Budget it is considered salary even though from year to year they may or may not get that amount. Is their salary for rank plus additional duties their final pay?

2. Does the phrase "retirement benefit may not exceed 100% plus up to $200 for time served," as it is used in A.C.A. § 24-10-

602(4), make the retirement benefit a mandatory 100% plus bonuses or is that up to the local retirement board to set the amount over the state minimum?

3. If the Arkansas Fire & Police Pension Review Board sets the minimum amount paid to the rank and file firemen and says when it can be increased for the bottom level, how are the top office retirement benefits set for those making $500 to $1,000 per month?

4. If it is mandatory that the Board pay the 100% salary and benefits, do they have to go back and make up for years past?

5. Pursuant to provisions of A.C.A. 24-11-102, does a 15-year-old letter (August 1997) from the Board authorizing 100% benefits remain in effect even though (a) the pension fund for some time back has been and remains insolvent; and (b) subsequent letters (December 1999) from the Board have denied benefit increases?

RESPONSE

Despite the fact that you refer repeatedly to the chapter of the Arkansas Code dealing with the Arkansas Local Police and Fire Retirement System, your actual concern, as reflected in your factual recitations, is with local pension funds that are subject to a different chapter of the Code. With respect to your first question, in my opinion, to the extent that the consideration for undertaking activities such as "teaching or being a fire inspector" constitutes an element of recurring pay, such consideration will in all likelihood be deemed to constitute an element of "salary" for purposes of determining retirement benefits under a local plan. Only a finder of fact, however, could determine whether this condition has been met. With respect to your second question, as explained further below, the Code dictates only certain "mandatory" *minimum* benefits for firefighters. Subject to review and approval by the Arkansas Fire and Police Pension Review Board (the "PRB"), the local retirement board may indeed, as you phrase it, "set the amount over the state minimum." With respect to your third question, in my opinion, the procedure for setting retirement benefits for firefighters "making $500 to $1,000 per month" is the same as that applicable to "the rank and file firemen." With respect to your fourth question, benefits at 100% of salary are "mandatory" only if a local board has declared as much and the PRB has approved. Only a finder of fact could

establish whether any particular local pension board is currently committed to provide benefits at this level. Any such "mandatory" amount is always subject to reduction pursuant to statute for each year in which the board is unable to pay such benefits. In the event of such insolvency, for the year in question, the board may make partial payments, with no obligation to "go back and make up for years past." By contrast, if the local board determines that it has miscalculated and underpaid benefits due from a solvent local fund, it is, in my opinion, contractually obligated, subject to any applicable statute of limitations, to pay the deficiency. With respect to your fifth question, as a general proposition, the denial by the PRB of a local board's request to increase benefits will never render void the benefit scheme in place at the time of the request. Specifically with respect to the situation in Morrilton, only a finder of fact could determine what scheme currently applies under its local benefits plan. As a general matter, however, if a local board properly adopts a particular benefits scheme and makes no subsequent change, that scheme remains in effect, subject only to annual prorating of benefits in the event of fund insolvency.

Question 1: A.C.A. 24-10-607 says that the "rank of a member" as [sic] how to calculate final pay. Is the final pay for participants just for the rank or would it also include such things as extra pay for teaching or being a fire inspector, which is part of their recurring salary paid by the department? AG Opinion 2001-265 Question 5 seems to say that if it is a line item in General Budget it is considered salary even though from year to year they may or may not get that amount. Is their salary for rank plus additional duties their final pay?

As an initial matter, I must note that your request appears to confuse two chapters of the Arkansas Code dealing with firefighter retirement benefits. You expressly refer in your question to A.C.A. § 24-10-607,[1] which contains provisions applicable to disability retirement benefits available under the Arkansas Local Police and Fire Retirement System ("LOPFI").[2] You further expressly represent that all of your questions are "in regards to" LOPFI. Your questions repeatedly refer, however, to local plans of a sort that are treated in a separate chapter of the

[1] A.C.A. § 24-10-607 (Supp. 2011), as amended by Acts 2013, No. 40, § 10.

[2] The statutory provisions relating to LOPFI are set forth in chapter 10 of title 24 of the Arkansas Code (Repl. 2002 & Supp. 2011), as amended by Acts 2013, No. 40. LOPFI was established pursuant to Acts 1981, No. 364.

Code devoted to retirement benefits.[3] Your references in your factual recitation to "the Local Volunteer Fireman's Pension fund" and "the local board" further suggest that the plan here at issue is not controlled by LOPFI but rather falls under the latter chapter just referenced. My independent inquiries confirm that this is indeed the case, as does your reference to an Arkansas Attorney General opinion that deals with the latter chapter. I will accordingly focus my discussion on the chapter of the Code dealing with local plans, not on LOPFI.

You have asked whether payments for activities such as teaching or acting as a fire inspector fall within what you term "final pay" for purposes of determining retirement benefit levels. Although the LOPFI statute referenced in your question deals specifically with disability benefits, you have singled out this statute apparently only because it supposedly identifies the "rank of a member" as determinative of retirement benefits in general.[4] Given the focus of this and your other questions, I will assume that you are concerned with determining whether activities of the sort recited should be included in the general calculation of disability retirement benefits under a local plan.

The applicable statute provides in pertinent part:

> As used in this section, unless the context otherwise requires, the term ***"salary" shall mean recurring pays*** that are received for the firefighter's regularly scheduled workweek ***and shall not include***, except as otherwise provided in subdivision (a)(1)(B) of this section, payments for unused accrued sick leave or annual leave or the cash value of ***any nonrecurring or unusual remunerations.***[5]

The concept of "rank," which you specifically mention in your question, appears in the following provision of the statute:

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[3] The statutory provisions addressing local plans of the sort apparently at issue in your request – plans that became "closed" to further enrollment in 1983 – are codified in chapter 11 of title 24 of the Code (Repl. 2002 & Supp. 2011), as amended by Acts 2013, No. 41.

[4] Although it is not material to my discussion, I will point out in passing that the statute actually never refers to a member's "rank" as determinative of benefits.

[5] A.C.A. § 24-11-818(a)(1)(A) (Repl. 2002), as amended by Acts 2013, No. 41, § 27 (emphases added).

> Any pension fund member who has served in a fire department in the State of Arkansas for a period of twenty (20) years or more, the last five (5) years of which shall have been consecutive, shall be entitled to be retired and receive from the fund a monthly pension equal to one-half (1/2) of ***the salary attached to the rank*** he or she held as a volunteer, part-paid, or full-paid member.[6]

Reading these two statutory provisions together, I believe that, for purposes of calculating retirement benefits, the term "salary" might generally include not only a base salary directly incident to holding a particular rank but also any payment through the department for recurring services performed by a particular individual holding that rank. I offer this opinion because such supplemental recurring services necessarily fall within the category of "recurring pays."

You report that "teaching or being a fire inspector . . . is part of their recurring salary paid by the department." I am neither authorized nor situated to test the accuracy of this factual representation. If this representation is correct, however, such compensation would indeed appear to constitute an element of "salary," which is a measure used to calculate retirement benefits. Not being a finder of fact, I am unable to make this determination in any particular case.

This opinion is in all respects consistent with the analysis of my predecessor in Op. Att'y Gen. 2001-265, which you inaccurately paraphrase in your question as follows:

> AG Opinion 2001-265 Question 5 seems to say that if it is a line item in the General Budget it is considered salary even though from year to year they may or may not get that amount.

My predecessor opined only that "overtime/FSLA compensation" should be considered "part of the fire fighter's salary for purposes of calculating retirement benefits" if, and only if, such compensation "is paid as a part of the fire fighter's regular, recurring salary, for a regularly scheduled workweek, that regularly includes a certain amount of overtime." Elaborating on this conclusion, he remarked: "However, if the overtime/FLSA compensation is paid for occasional, non-regular overtime work, it should not be considered part of the fire fighter's salary." In support of this analysis, my predecessor invoked "the plain language"

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[6] *Id.* at subsection (a)(2) (emphasis added).

of the statute discussed above, which remains in all material respects the same now as it was then.

Question 2: Does the phrase "retirement benefit may not exceed 100% plus up to $200 for time served," as it is used in A.C.A. 24-10-602(4), make the retirement benefit a mandatory 100% plus bonuses or is that up to the local retirement board to set the amount over the state minimum?

Despite your citation to a statute under LOPFI, your concern in this question again appears to be with the scope of the Code chapter dealing with local plans. You indicate as background to this question that the focus of your inquiry is the fire chief, who I am informed is enrolled in a local plan, as your reference to the involvement of "the local retirement board" confirms.[7]

The Code contains no "mandatory" requirement that benefits be set at 100% of salary. A local board, however, at its discretion, may set base retirement benefits at any level above the state minimum up to 100% of salary, possibly supplemented by additional sums calculated upon length of service. An award of benefits at that level becomes "mandatory" only if a local board has so indicated, subject to the statutory condition that a fund will pay prorated benefits in any given year in which it is unable to pay full benefits.

With respect to what you term "bonuses," the Arkansas Code specifies what amounts will be awarded above base benefits for annual service exceeding 20 years. For local plans of the sort here at issue, the cap on such "bonus" benefits is $100 per month for a full-paid firefighter and $50 per month for a volunteer or part-paid firefighter. Amounts paid up to that cap are statutorily dictated based upon the length of service in excess of 20 years.

The Code addresses this question as follows:

> (a)(2) Any pension fund member who has served in a fire department in the State of Arkansas for a period of twenty (20) years or more, the last five (5) years of which shall have been consecutive, shall be entitled to be retired and receive from the fund a monthly

[7] By statute, a local retirement board "shall provide for the disbursement of the firemen's relief and pension fund and shall designate its beneficiaries as directed. . . ." A.C.A. § 24-11-801(b) (Supp. 2011).

> pension equal to one-half (1/2) of the salary attached to the rank he or she held as a volunteer, part-paid, or full-paid member.
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> (c) Any full-paid fire fighter firefighter who is already retired shall not receive less than three hundred fifty dollars ($350) per month.
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> (d)(1)(A)(i) Any full-paid firefighter who has more than twenty (20) years of service at the time of retirement shall be entitled to receive the sum of twenty dollars ($20.00) per month in addition to his or her regular retirement pay for each full year worked over and above twenty (20) years.
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> (ii) In no instance shall he or she receive more than one hundred dollars ($100) per month in addition to his or her regular benefits.
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> (B)(i) A volunteer or part-paid firefighter who has more than twenty (20) years of service at the time of retirement shall be entitled to receive the sum of ten dollars ($10.00) per month in addition to his or her regular retirement pay for each full year worked over and above twenty (20) years.
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> (ii) In no instance shall he or she receive more than fifty dollars ($50.00) per month in addition to his or her regular benefits.[8]

The Code further mandates that volunteer firefighters receive benefits of at least $100 per month.[9]

To recap, these statutory provisions establish the following: (1) that any eligible firefighter will be entitled to receive at least ½ of his salary as a pension; (2) that any eligible firefighter will be entitled to receive at least a specified minimum monthly amount per month as a pension[10]; (3) that any eligible full-paid firefighter

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[8] A.C.A. § 24-11-818, as amended by Acts 2013, No. 41, § 27.

[9] A.C.A. § 24-11-807(a) (Supp. 2011).

[10] This provision will obviously be pertinent only if the amount calculated under item (1) just listed is lower.

will be entitled to receive an additional amount ranging from $20 to $100 per month; and (4) that any volunteer or part-paid firefighter will be entitled to receive an additional amount ranging from $10 to $50 per month.

As reflected in the following, a local board of trustees has the discretion to raise the guaranteed minimums summarized above:

> The board of trustees of a municipal firemen's relief and pension fund . . . [is] authorized to increase benefits for future or current retired members and beneficiaries of the firemen's relief and pension fund. . . .[11]

This discretion is subject to approval based upon a review of a fund's actuarial soundness conducted pursuant to rules promulgated by the PRB.[12]

With respect to your use of the term "mandatory," the above benefit entitlement structure is qualified by the Code provision anticipating that financial circumstances might render a local board unable to discharge what would otherwise be its benefits obligations, in which case an obligation that would otherwise be "mandatory" must be modified by the local board in a manner discussed in my response to your fourth question.

Question 3: If the Arkansas Fire & Police Pension Review Board sets the minimum amount paid to the rank and file firemen and says when it can be increased for the bottom level, how are the top office retirement benefits set for those making $500 to $1,000 per month?

As reflected in my response to question 2, the Code sets as minimum benefits the greater of either ½ of salary or a specified amount for eligible firefighters, regardless of rank. The Code further authorizes a local board, subject to PRB approval based upon an actuarial analysis of plan resources, to seek approval to set

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[11] A.C.A. § 24-11-102(a) (Supp. 2011). With the exception of the statute authorizing partial payment of benefits based upon a plan's financial distress, *see* response to question 4, *infra*, the Code contains no corresponding provision empowering a local board to *decrease* benefits. This office has previously opined that a statute authorizing such decreases at a local board's discretion would be constitutionally suspect as a possible impairment of contract. *See* Ops. Att'y Gen. 2009-102 and 2009-049.

[12] *See* A.C.A. § 24-11-102(b). The PRB reviews the actuarial soundness of a local plan as a basis for determining whether to approve a proposed benefits increase. *See* Op. Att'y Gen. 2005-041 (discussing the manner of evaluating the actuarial soundness of a firefighters' pension plan).

benefits at amounts higher than the guaranteed minimums. These conclusions apply regardless of whether the firefighter occupies what you term a "top office."

Question 4: If it is mandatory that the Board pay the 100% salary and benefits, do they have to go back and make up for years past?

In my opinion, barring the above discussed effects of insolvency and subject to the applicable statute of limitations on contractual claims, if a local fund has committed to pay retirement benefits at 100% of salary, it will indeed "have to go back and make up for" unpaid benefits in "years past." I am neither authorized nor situated to address the factual question of what obligations, if any, remain unmet in this regard under the Morrilton or any other local plan.

In referring to a "mandatory" payment of "100% salary," I assume you are referring to an amount set by a local board above the state minimum. As noted above, I cannot address whether any such increase was indeed effectively adopted in any particular case. Assuming it was, however, it remains the case that, as a matter of statutory law, providing benefits at that approved level would be "mandatory" only if the local board had the financial resources in any given year to make the payments.[13] As discussed immediately below, the Code provides for making prorated payments in any year in which a fund is insolvent.[14] Such partial payment, in my estimation, constitutes a complete discharge of the board's

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[13] I do not consider this conclusion as running counter to the constitutional prohibition against the impairment of contracts, which would preclude a state or its political subdivisions from denying a fund member his contractual entitlement to benefits that had vested under the terms of a particular plan. *See* Ops. Att'y Gen. 2009-102 and 2009-049 (addressing requests relating to this constitutional issue with respect to local firefighter pension plans). To the extent, however, that a plan is subject to a statutory requirement that benefits be prorated or otherwise reduced during a period when a plan is insolvent – i.e., unable to meet its scheduled commitments to pay benefits – that provision will become a part of the contract. *See, e.g.*, *Woodend v. Southland Racing Corp.*, 337 Ark. 380, 384, 989 S.W.2d 505 (1999), citing *Mahurin v. Oaklawn Jockey Club*, 299 Ark. 13, 771 S.W.2d (1989) ("It is . . . well settled that the law in effect at the time a contract is made forms a part of the contract as if it had been expressed in the contract."). Such a condition has applied under Arkansas law since the inception of local plans. *See* Acts 1921, No. 491, § 20. There would thus appear to be no basis under the state or federal constitution to claim that restricting benefits pursuant to this statute would amount to an impermissible impairment of contract.

[14] The notion of "solvency," in the sense of being able to pay full benefits in a given fiscal year, should not be confused with the concept of "actuarial soundness." *See* Op. Att'y Gen. 2005-041 (generally distinguishing these two concepts). The PRB board considers a plan's actuarial soundness in determining whether to approve a proposed benefits increase – an inquiry not at issue in your request.

obligations under the local plan, meaning that, under such circumstances of insolvency, the board does not have "go back and make up for years past."[15]

The statutory qualification just mentioned provides as follows:

> Should the fund provided for in this subchapter be insufficient to make full payment of the amount of pensions to all persons entitled thereto, then the funds shall be prorated among those entitled by the proper authorities as may be deemed just and equitable.[16]

Subsection (d) of this statute sets forth the following options for the local board in exercising this discretion:

> (1) The board of trustees pays the full minimum benefit each month to all eligible beneficiaries until assets in the fund are depleted for the fiscal year, at which time all payments shall cease until revenues are received for the next fiscal year; or
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> (2) The board of trustees decreases all payments to all eligible beneficiaries by an equal proportion for the fiscal year and does not allow the assets in the fund to become fully depleted.

Your suggestion that a local board might be obliged to "make up for years past" in which the board failed to pay "mandatory" benefits may alternatively refer to the situation arising when a local board has simply miscalculated benefits due. It is my understanding that the PRB, if asked to review the propriety of a payment calculation, will report any miscalculation to the local board, leaving it up to the board to handle the matter. PRB Rule 5(3) addresses this situation as follows: "Back payments for underpaid benefits shall be left to the discretion of the local board and its legal counsel." This provision is apparently intended to do no more than acknowledge that the local board is ultimately responsible for determining the amounts of any benefits payments due. Assuming that a fund in a given year was solvent, a particular claimant who indeed establishes that he was "underpaid" for that year would appear to have a contractual right to repayment that would exist for the applicable limitations period. As the Rule suggests, determining when

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[15] *Accord* Ops. Att'y Gen. 96-115; 95-145; and 92-345.

[16] A.C.A. § 24-11-807(b).

such circumstances exist is a matter to be addressed by the local board and its counsel.

Question 5: Pursuant to provisions of A.C.A. 24-11-102, does a 15-year-old letter (August 1997) from the Board authorizing 100% benefits remain in effect even though (a) the pension fund for some time back has been and remains insolvent; and (b) subsequent letters (December 1999) from the Board have denied benefit increases?

Without presuming to address the particulars of a specific local pension fund, I will simply opine generally that any local board's authorization of benefits, if validly issued, will remain in effect notwithstanding the subsequent denial of a proposed benefits increase. Nothing supports the suggestion that the rejection of a proposed increase will operate to render void the benefits plan in effect at the time of the rejection. To be sure, payments under any current plan will always be subject to possible proration in the event of insolvency. However, the fact that benefits must be prorated in a particular year will not void the benefits plan in effect in the prior year. As previously discussed, a statutory provision mandating proration in the event of insolvency is a necessary term of the plan itself. The plan consequently remains in effect notwithstanding the plan's insolvency in any given year.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh