

# OREGON PUBLIC EMPLOYEES RETIREMENT BOARD

**Friday**  
**March 28, 2008**  
**1:00 P.M.**

**PERS**  
**11410 SW 68<sup>th</sup> Parkway**  
**Tigard, OR**

|   | <b>ITEM</b>   | <b>PRESENTER</b>                    |
|---|---|-------------------------------------|
| <b>A. Administration</b>  |   |                                     |
| 1.<br>2.  | February 15, 2007 Board Meeting Minutes<br>Director's Report<br>a. Forward-Looking Calendar<br>b. OIC Investment Report<br>c. Budget Report   | CLEARY                              |
| <b>B. Consent Action and Information Items</b>                                    |   |                                     |
| 1.<br>2.<br>3.<br>4.<br>5.<br>6.<br>7.<br>8.                                      | Notice of Model Rules of Procedure<br>First Reading of Definition of Salary Rules<br>Adoption of Administrative Review and Appeals Processes Rules<br>Adoption of Review of Staff Actions and Determinations for Employers Rule<br>Adoption of Employer Contributions for Prior Periods Rule<br>Adoption of Selection of Benefit Option and Commencement of Allowance (Disability) Rule<br>Adoption of OSGP Unforeseeable Emergency Withdrawal Appeals Committee Rule<br>Temporary Adoption of Creditable Service/Retroactive Salary Payments Rules | RODEMAN                             |
| <b>C. Action and Discussion Items</b>   |   |                                     |
| 1.<br>2.<br>3.  | 2007 Final Earnings Crediting<br>Further Development of 2009 Legislative Concepts<br>Delegation Options in Contested Cases  | ORR / RODEMAN<br>RODEMAN<br>RODEMAN |
| <b>D. Executive Session Pursuant to ORS 192.660(2)(f), (h), and/or ORS 40.225</b> |   |                                     |
| 1.  | Litigation Update   | LEGAL COUNSEL                       |

**In compliance with the Americans with Disabilities Act, PERS will provide this document in an alternate format upon request. To request this, contact PERS at 888-320-7377 or TTY 503-603-7766.**

**Note:** *If you have a disability that requires any special materials, services or assistance, call (503) 603-7575 at least 48 hours before the meeting.*

Michael Pittman, Chair \* James Dalton \* Thomas Grimsley \* Eva Kripalani \* Brenda Rocklin  
Paul R. Cleary, Executive Director

|         |         |
|---------|---------|
| MEETING | 3-28-08 |
| DATE    |         |
| AGENDA  | A.1.    |
| ITEM    | Minutes |

**PUBLIC EMPLOYEES RETIREMENT BOARD**

PERS Board Meeting  
1 P.M., February 15, 2008  
Tigard, Oregon

**MINUTES**

**Board Members:**

Brenda Rocklin, Vice-Chair  
James Dalton  
Eva Kripalani  
PHONE: Thomas Grimsley  
Excused: Mike Pittman, Chair

**Staff:**

|               |                |                |
|---------------|----------------|----------------|
| Donna Allen   | Joe DeLillo    | Dale Orr       |
| Paul Cleary   | Yvette Elledge | Susan Riswick  |
| Gay Lynn Bath | Rick Howitt    | Steve Rodeman  |
| Helen Bamford | Jeff Marcic    | Jason Stanley  |
| David Crosley | Zue Matchett   | Patrick Teague |
|               |                | Dave Tyler     |

**Others:**

|               |                |                  |                  |
|---------------|----------------|------------------|------------------|
| Linda Ely     | E. Marie Laird | Greg Smith       | Lori Sattenspiel |
| Frank Goulard | Matt Larrabee  | Deborah Tremblay | David Wimmer     |
| Greg Hartman  | P. Peg         | Dallas Weyand    | Scott Winkels    |
| Blake Johnson | Bill Robertson | Brenda Wilson    | Denise Yunker    |
| Keith Kutler  |                |                  |                  |

Vice-Chair Brenda Rocklin called the meeting to order at 1:00 P.M.

**ADMINISTRATION**

**B.1. BOARD MEETING MINUTES OF NOVEMBER 16, 2007**

The Board unanimously approved the November 16, 2007 Board meeting minutes

**B.2. DIRECTOR'S REPORT**

Director Paul Cleary presented the Forward-Looking calendar, noting that the next Board meeting is scheduled on March 28 to accommodate a 30-day period between the time the agency reports preliminary earnings crediting to the legislature and the Board's adoption of final earnings crediting. Cleary encouraged stakeholder input and comments on upcoming rule adoptions that will be presented at the March meeting. Cleary introduced Oregon State Treasury's Chief Investment Officer Ron Schmitz, who provided a year-end summary of the Oregon Public Employees Retirement Fund (OPERF) investment returns, with regular account earnings of 9.66% and variable account earnings of 1.54%. Schmitz also presented the January 2008 investment report and reviewed recent changes in the report including an additional section which provides the OPERF Variable Account returns. Schmitz summarized an agenda item from the January 30, 2008 Oregon Investment Council (OIC) meeting when the OIC approved restructuring the Variable Account from a U.S. equity portfolio to a global equity portfolio.

Cleary presented the Employer Reporting and Outreach Report covering the 2007 year-end closing process. Cleary said the 2005 – 07 agency budget closed with a positive variance. Cleary said the 2007 – 09 budget is effected by the collective bargaining agreement and will likely be revised with an upcoming budget limitation adjustment. Cleary also summarized the agency's

progress report to the Joint Committee on Ways and Means covering ongoing workload, the *Strunk/Eugene* project, and the RIMS Conversion project. Cleary provided an update on the PERS Retiree Health Insurance Program. Cleary said the 2007 adoption of HB 2423 amending the Administrative Procedures Act allows the PERS Board to delegate the authority for final orders in contested cases. The Board asked staff to present delegation options for further consideration at the March Board Meeting.

## **CONSENT ACTION AND INFORMATION ITEMS**

### **B.1. THIRD READING OF ADMINISTRATIVE REVIEW AND APPEAL PROCESSES RULES**

### **B.2. FIRST READING OF EMPLOYER CONTRIBUTIONS FOR PRIOR PERIODS**

### **B.3. NOTICE OF REVIEW OF STAFF ACTIONS REGARDING EMPLOYERS**

Steve Rodeman, Policy, Planning, and Legislative Analysis Division (PPLAD) administrator, presented the three related agenda items on rules addressing administrative review and appeal processes for member and employer issues. Rodeman summarized public comments received to date and reviewed modifications made to these rules. Rodeman said that the public comment period ends on February 22, 2008 and these rules would be presented for adoption at the March meeting.

### **B.4. SECOND READING OF "EQUAL TO OR BETTER THAN" RULES**

Rodeman presented the second reading of the "Equal to or Better Than" (ETOB) rules developed to reflect 2007 legislative changes and identify the circumstances that would trigger an ETOB review. Rodeman said an additional public hearing is scheduled on February 26, 2008 and this rule may be presented for adoption at the March 28, 2008 meeting if stakeholder consensus is achieved or may be deferred to allow for further stakeholder discussions.

### **B.5. NOTICE OF DEFINITION OF SALARY RULES**

Rodeman presented the notice of rulemaking on definition of salary to clarify that "non-elective" employer 403(b) contributions allowed by HB 3183 will not be considered "salary" for PERS purposes. Rodeman said an additional public hearing is scheduled on February 26, 2008, and the rule will be presented for first reading at the March 28, 2008 meeting

### **B.6. NOTICE OF SELECTION OF BENEFIT OPTION AND COMMENCEMENT OF ALLOWANCE (DISABILITY) RULE**

Rodeman presented the notice of rulemaking to clarify the administration of purchases of additional creditable service and retirement credit by members approved for disability retirement, and by their beneficiaries who may find it necessary to exercise the option selection and make the purchases if the member dies prior to application approval. Rodeman said the public comment period ends February 22, 2008 and the rules will be presented for adoption at the March 28, 2008 meeting.

### **B.7. NOTICE OF OSGP UNFORESEEABLE EMERGENCY WITHDRAWAL APPEALS COMMITTEE RULE**

Rodeman presented the notice of rulemaking that would allow the Oregon Savings Growth Plan (OSGP) Emergency Withdrawal Appeals Committee to meet on an appeal sooner than currently

allowed and to meet by phone or in person. Rodeman said that public comment ends March 21, 2008 and the first rule will be presented for adoption at the March 28, 2008 meeting.

## **ACTION AND DISCUSSION ITEMS**

### **C.1. 2007 PRELIMINARY EARNINGS CREDITING AND RESERVING**

Actuarial Analysis Coordinator Dale Orr presented staff recommendations for 2007 preliminary earnings crediting and reserving decisions. Those recommendations included adding \$357.4 million to the Contingency Reserve representing 7.5% of available earnings, which is the maximum amount allowed by statute, bringing that reserve to a balance of \$652.7 million.

Steve Rodeman described the Oregon Supreme Court's award of fees and costs to member's attorneys for the *Strunk* case totaling about \$2.1 million on a common fund theory of recovery. As a result, about \$1.4 million will be subtracted from Tier One member regular account earnings for 2007, reducing the 8% earnings crediting to an effective crediting rate of 7.97%. All remaining Tier One member regular account earnings will be deposited in the Tier One Rate Guarantee Reserve, bringing that balance to about \$1.9 billion. The remainder of the member's attorney fee award (about \$764,000) will be charged to retired members who were subject to the COLA freeze as a one-time deduction from their August 2008 benefit payment.

The Board heard comments from Bill Robertson raising questions about the member's attorneys fee deduction and from Greg Hartman on the reserving recommendations. The Board also heard from Matt Larrabee with Mercer who confirmed that, based on the criteria and results from last year's financial modeling, the Tier One Rate Guarantee Reserve would still not be considered fully funded.

It was moved by Eva Kripalani and seconded by James Dalton to adopt the staff's 2007 recommended preliminary earnings crediting and reserve allocations subject to final adoption at the March 28, 2008 meeting. The motion passed unanimously.

### **C.2. LEGISLATIVE CONCEPTS FOR 2009**

Rodeman reviewed five potential legislative concepts that may be introduced as agency-sponsored bills. Rodeman said that the staff and stakeholder suggestions have been discussed with the PERS Legislative Advisory Committee. Rodeman noted the lack of stakeholder consensus on the overall issue of re-employing retired members and the Board concurred with only pursuing a very limited change as an agency legislative concept. The Board also asked staff to further review the other concepts to determine if any could be achieved administratively rather than requiring statutory changes. Rodeman said staff would report on further developments of the remaining legislative concepts at the March Board meeting.

PERS Board meeting

2/15/2008

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**EXECUTIVE SESSION**

No executive session was held.

There being no further business, Vice-Chair Rocklin adjourned the meeting at 2:45 P.M.

Respectfully submitted,

A handwritten signature in cursive script that reads "Paul R. Cleary".

Paul R. Cleary  
Executive Director

# PERS Board Meeting Forward-Looking Calendar

|         |          |
|---------|----------|
| MEETING | 03-28-08 |
| DATE    |          |
| AGENDA  | A.2.a    |
| ITEM    | Calendar |

## April 2008

**No Meeting Scheduled**

## May 2008

### **May 16, 2008**

Adoption of Model Rules of Procedure  
First Reading of Creditable Service/Retroactive Salary Payments Rules  
First Reading of Public Records Rule  
Initial Review of Agency 2009-11 Budget Policy Option Packages

## June 2008

### **June 27, 2008 (tentative)**

Approval of Retiree Health Insurance 2009 Plan Renewals and Rates  
Approval of Agency 2009-11 Budget Policy Option Packages for Submission to DAS

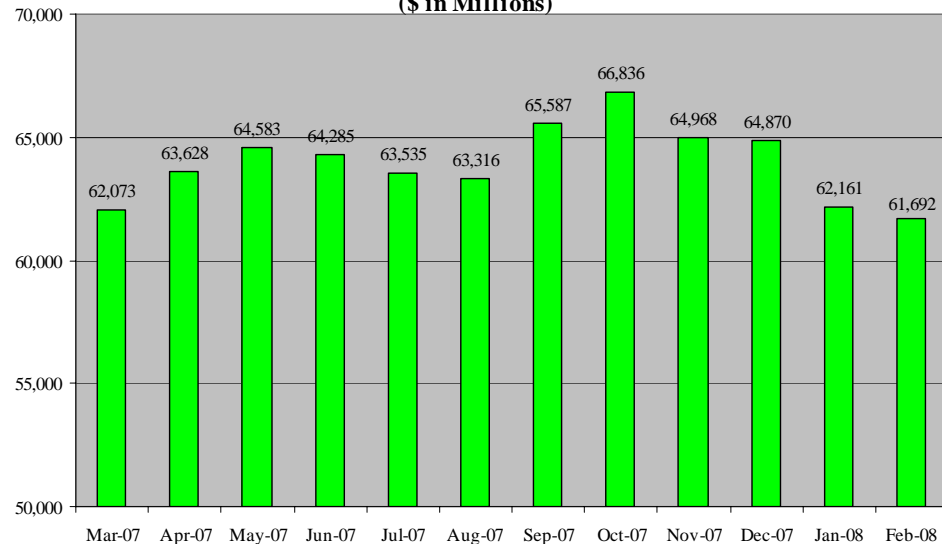
## July 2008

### **July 25, 2008 (Tentative)**

2007 Actuarial Valuation Results and Employer Contribution Rate Summary

| OPERF  | Regular Account     |                     |                           |               | Historical Performance    |               |               |              |              |              |
|--|---------------------|---------------------|---------------------------|---------------|---------------------------|---------------|---------------|--------------|--------------|--------------|
|  | Policy <sup>1</sup> | Target <sup>1</sup> | \$ Thousands <sup>2</sup> | Actual        | Year-To-Date <sup>3</sup> | 1 YEAR        | 2 YEARS       | 3 YEARS      | 4 YEARS      | 5 YEARS      |
| Domestic Equity                              | 12-22%              | 17%                 | \$ 10,203,596             | 16.9%         | (9.23)                    | (5.00)        | 2.59          | 5.81         | 6.33         | 12.87        |
| Non-US Equity                                | 17-27%              | 22%                 | 14,417,481                | 23.9%         | (6.83)                    | 6.68          | 13.17         | 16.29        | 17.24        | 24.19        |
| Global Equity                                | 4-10%               | 7%                  | 4,400,011                 | 7.3%          | (9.06)                    | (2.12)        |               |              |              |              |
| Private Equity                               | 12-20%              | 16%                 | 9,015,035                 | 15.0%         | N/A                       | 25.76         | 20.64         | 28.00        | 27.65        | 21.48        |
| <b>Total Equity</b>                          | <b>57-67%</b>       | <b>62%</b>          | <b>38,036,123</b>         | <b>63.1%</b>  |                           |               |               |              |              |              |
| Opportunity Portfolio                        |                     |                     | 604,945                   | 1.0%          | (0.19)                    | 2.81          |               |              |              |              |
| <b>Total Fixed</b>                           | <b>22-32%</b>       | <b>27%</b>          | <b>16,692,531</b>         | <b>27.7%</b>  | <b>0.34</b>               | <b>3.61</b>   | <b>5.06</b>   | <b>4.76</b>  | <b>4.76</b>  | <b>5.56</b>  |
| <b>Real Estate</b>                           | <b>8-14%</b>        | <b>11%</b>          | <b>4,910,321</b>          | <b>8.2%</b>   | <b>(1.02)</b>             | <b>6.99</b>   | <b>16.52</b>  | <b>23.18</b> | <b>21.58</b> | <b>21.14</b> |
| <b>Cash</b>                                  | <b>0-3%</b>         | <b>0%</b>           | <b>2,943</b>              | <b>0.0%</b>   | <b>0.90</b>               | <b>5.43</b>   | <b>5.35</b>   | <b>4.72</b>  | <b>3.92</b>  | <b>3.39</b>  |
| <b>TOTAL OPERF Regular Account</b>           |                     | <b>100%</b>         | <b>\$ 60,246,863</b>      | <b>100.0%</b> | <b>(4.05)</b>             | <b>4.33</b>   | <b>8.46</b>   | <b>10.96</b> | <b>11.15</b> | <b>14.42</b> |
| <b>OPERF Policy Benchmark</b>                |                     |                     |                           |               | <b>(3.84)</b>             | <b>5.54</b>   | <b>9.04</b>   | <b>10.08</b> | <b>10.21</b> | <b>13.89</b> |
| Value Added                                  |                     |                     |                           |               | <b>(0.21)</b>             | <b>(1.21)</b> | <b>(0.58)</b> | <b>0.88</b>  | <b>0.94</b>  | <b>0.53</b>  |
| <b>TOTAL OPERF Variable Account</b>          |                     |                     | <b>\$ 1,444,688</b>       |               | <b>(8.87)</b>             | <b>(7.44)</b> | <b>1.31</b>   | <b>4.80</b>  | <b>5.67</b>  |              |
| <b>Asset Class Benchmarks:</b>               |                     |                     |                           |               |                           |               |               |              |              |              |
| Russell 3000 Index                           |                     |                     |                           |               | (8.98)                    | (4.52)        | 3.43          | 5.71         | 6.19         | 12.44        |
| MSCI ACWI Free Ex US                         |                     |                     |                           |               | (7.06)                    | 7.79          | 13.92         | 16.27        | 17.22        | 24.09        |
| Russell 3000 Index + 300 bps--Quarter Lagged |                     |                     |                           |               | N/A                       | 19.64         | 16.43         | 17.07        | 17.67        | 20.32        |
| LB Universal--Custom FI Benchmark            |                     |                     |                           |               | 1.53                      | 6.36          | 6.11          | 5.16         | 4.70         | 4.87         |
| NCREIF Property Index--Quarter Lagged        |                     |                     |                           |               | N/A                       | 17.30         | 17.46         | 18.03        | 16.60        | 14.79        |
| 91 Day T-Bill                                |                     |                     |                           |               | 0.65                      | 4.86          | 4.93          | 4.42         | 3.68         | 3.16         |

**TOTAL OPERF NAV**  
 (includes variable fund assets)  
 One year ending February 2008  
 (\$ in Millions)



<sup>1</sup>OIC Policy 4.01.18, as revised September 2007.

<sup>2</sup>Includes impact of cash overlay management.

<sup>3</sup>For mandates beginning after January 1, YTD numbers are "N/A". Performance is reflected in Total OPERF.



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

Headquarters:  
11410 S.W. 68<sup>th</sup> Parkway, Tigard, OR  
Mailing Address:  
P.O. Box 23700  
Tigard, OR 97281-3700  
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TTY (503) 603-7766  
[www.oregon.gov/pers](http://www.oregon.gov/pers)

March 28, 2008

TO: Members of the PERS Board  
FROM: Kyle J. Knoll, Business Operations Manager  
SUBJECT: March 2008 Budget Report

|              |                |
|--------------|----------------|
| MEETING DATE | <b>3/28/08</b> |
| AGENDA ITEM  | <b>A.2.c.</b>  |

### 2007-09 BUDGET UPDATE

Operating expenditures for the months of January and February 2008 were \$3,370,157 and \$3,029,713 respectively. Through the first eight months (33.33%) of the biennium, the Agency has expended a total of \$23,783,965, or 29.27% of our 2007-09 operating budget.

The negative budget variance for the biennium is currently projected at \$494,216. This variance continues to include the cost of the COLA increases under the DAS and SEIU 2007-09 Collective Bargaining Agreement, and does not include the additional budget limitation of \$2,800,000 to \$3,000,000 PERS anticipates receiving from the Legislature. Although review and approval of the additional limitation was initially anticipated during the February 2008 Supplemental Legislative Session, the DAS funding request on state agencies' behalf is currently anticipated for an Emergency Board in late June 2008.

It's also important to note that DAS has deferred the adjustment of State Data Center (SDC) rates for approximately six months, pending further review. As indicated in the February 2008 Budget Report to the Board, the significant decrease in rates reflected on PERS' SDC invoices since July 1, 2007 will at some point drive a corresponding decrease in PERS' budget limitation for SDC charges. But pending the outcome of DAS' SDC rate review, our budget variance will continue to reflect both the higher rates and projected expenditure limitation authorized in PERS' 2007-09 Legislatively Approved Budget (LAB).

### PERS PROGRESS REPORT - FEBRUARY 2008 SPECIAL LEGISLATIVE SESSION

On February 21, 2008, PERS Director Paul Cleary presented an overview of PERS Progress Report to the Full Ways & Means Committee.

- A copy of that Progress Report was included with the Director's February 2008 Report to the Board.
- The Progress Report was well received by the Committee. In particular, PERS received high marks for the success of the Retirement Application Assistance pilot program funded by the Legislature during the 2007 Legislative Session.

A.2. Attachment 1 – Total Agency Budget Spreadsheet

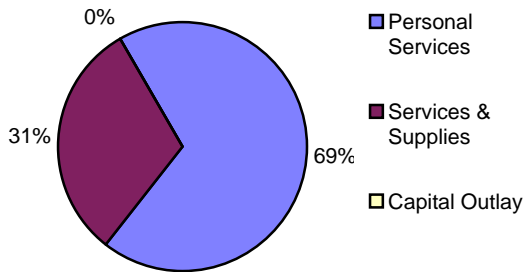


## 2007-09 Agency-wide Operations - Budget Execution Summary Budget Analysis For the Month of: February 2008

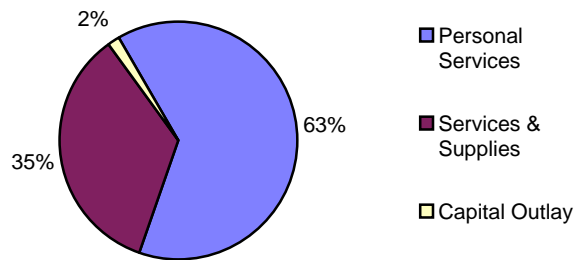
**Biennial Summary**

| Category            | Actual Exp. To Date | Projected Expenditures | Total Est. Expend. | 2007-09 LAB       | Variance         |
|---------------------|---------------------|------------------------|--------------------|-------------------|------------------|
| Personal Services   | 16,404,201          | 36,790,527             | 53,194,727         | 50,692,368        | (2,502,359)      |
| Services & Supplies | 7,379,764           | 20,260,756             | 27,640,520         | 29,611,077        | 1,970,557        |
| Capital Outlay      |                     | 910,114                | 910,114            | 947,701           | 37,587           |
| Special Payments    |                     |                        |                    |                   |                  |
| <b>Total</b>        | <b>23,783,965</b>   | <b>57,961,397</b>      | <b>81,745,362</b>  | <b>81,251,146</b> | <b>(494,216)</b> |

**Actual Expenditures**

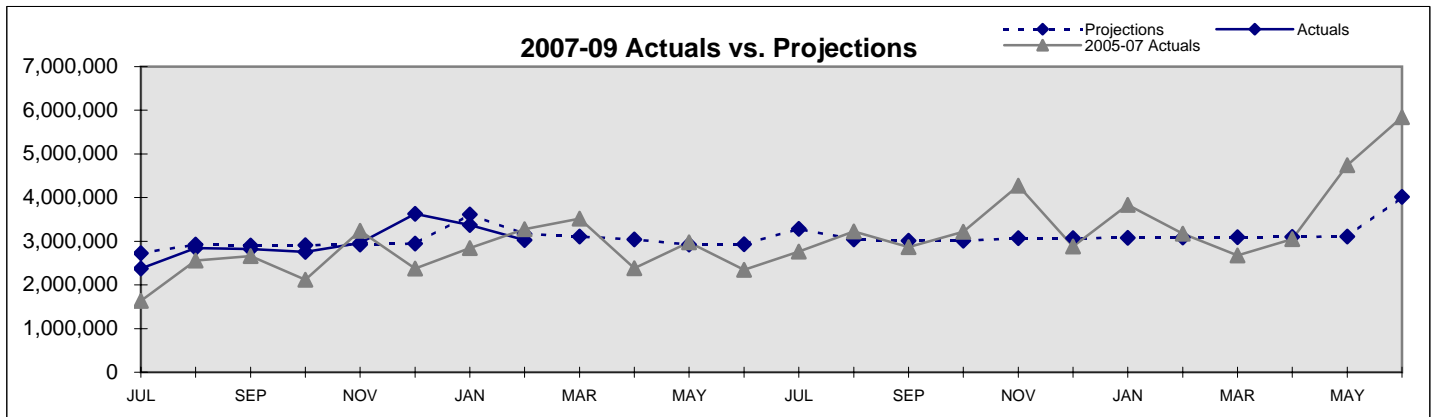


**Projected Expenditures**



**Monthly Summary**

| Category            | Actual Exp.      | Projections      | Variance       | Avg. Monthly Actual Exp. | Avg. Projected Expenditures |
|---------------------|------------------|------------------|----------------|--------------------------|-----------------------------|
| Personal Services   | 2,106,745        | 2,193,808        | 87,064         | 2,050,525                | 2,299,408                   |
| Services & Supplies | 922,968          | 971,294          | 48,326         | 922,471                  | 1,266,297                   |
| Capital Outlay      |                  |                  |                |                          | 56,882                      |
| Special Payments    |                  |                  |                |                          |                             |
| <b>Total</b>        | <b>3,029,713</b> | <b>3,165,102</b> | <b>135,389</b> | <b>2,972,996</b>         | <b>3,622,587</b>            |



**2005-07 Biennium Summary**

| Category            | Actual Exp. To Date | Projected Expenditures | Total Est. Expend. | 2005-07 LAB       | Variance       |
|---------------------|---------------------|------------------------|--------------------|-------------------|----------------|
| Personal Services   | 42,804,552          |                        | 42,804,552         | 46,875,869        | 4,071,317      |
| Services & Supplies | 31,107,541          |                        | 31,107,541         | 27,460,026        | (3,647,515)    |
| Capital Outlay      | 534,468             |                        | 534,468            | 679,533           | 145,065        |
| Special Payments    |                     |                        |                    |                   |                |
| <b>Total</b>        | <b>74,446,561</b>   |                        | <b>74,446,561</b>  | <b>75,015,428</b> | <b>568,867</b> |



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Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator, PPLAD  
SUBJECT: Notice of OAR 459-001-0005, *Model Rules of Procedure*

|              |  |
|--------------|--|
| MEETING DATE | <b>03/28/08</b>                          |
| AGENDA ITEM  | <b>B.1.<br/>Model Rules of Procedure</b> |

### OVERVIEW

- Action: None. This is notice that staff has begun rulemaking.
- Reason: Update the Model Rules of Procedure to reflect current state law.
- Subject: PERS Board's rules of procedure.
- Policy Issues: No policy issues were identified.

### BACKGROUND

The Oregon Administrative Procedures Act (APA) requires state agencies to adopt rules of procedure for rulemaking and for conducting contested case proceedings. The APA also requires the Attorney General to adopt model rules that state agencies must use, although agencies may adopt additional rules governing administrative procedures.

OAR 459-001-0005 adopted the Attorney General's Model Rules of Procedure that became effective on June 26, 2006. In response to statutory changes and appellate court decisions, the Attorney General updated the Model Rules, effective January 1, 2008. These rule modifications are only to conform to the date of and therefore adopt the updated Model Rules.

### LEGAL REVIEW

The proposed rule modification was submitted to the Department of Justice for legal review and any comments or changes will be incorporated before the rule is presented for adoption.

### PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing will be held on April 22, 2008 at 2:00 p.m. at PERS headquarters in Tigard. The public comment period ends on April 25, 2008 at 5:00 p.m.

### IMPACT

Mandatory: Yes, to comply with statute.

Impact: The modifications conform to state law and do not have a material fiscal or economic impact.

Cost: There is not expected to be any cost incurred by members, employers, PERS administration or the fund.

RULEMAKING TIMELINE

|                |   |
|----------------|---|
| March 14, 2008 | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.                                      |
| March 28, 2008 | PERS Board notified that staff began the rulemaking process.  |
| April 1, 2008  | <i>Oregon Bulletin</i> published the Notice.  |
| April 22, 2008 | Rulemaking hearing to be held at 2:00 p.m. in Tigard.   |
| April 25, 2008 | Public comment period ends at 5:00 p.m.   |
| May 16, 2008   | Staff proposes adopting the permanent rule modifications, including any amendments warranted by public comment or further research. |

NEXT STEPS

The public comment period ends at 5:00 p.m. on April 25. The rule is scheduled to be brought before the PERS Board for adoption at the May 16, 2008 meeting.

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 001 – PROCEDURAL RULES**

1 **459-001-0005**

2 **Model Rules of Procedure**

3 The Attorney General's Model Rules of Procedure under the Administrative  
4 Procedures Act, as adopted and effective January 1, ~~[2006]~~2008, are adopted as rules of  
5 procedure of the Public Employees Retirement Board, except as modified by other rules  
6 of the Board, to be effective on ~~[July]~~June 1, ~~[2006]~~2008.

7 [ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is  
8 available from the office of the Attorney General or the Oregon Public Employees  
9 Retirement System.]

10 Stat. Auth.: ORS 183.341 & 238.650

11 Stats. Implemented: ORS 238.005 - 238.715 & 237.410 - 237.620



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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
SUBJECT: First Reading of Definition of Salary Rules  
OAR 459-005-0001, *Definitions, Generally*  
OAR 459-070-0001, *Definitions*

|              |                                      |
|--------------|--------------------------------------|
| MEETING DATE | <b>03/28/2008</b>                    |
| AGENDA ITEM  | <b>B.2.<br/>Definition of Salary</b> |

### OVERVIEW

- Action: None. This is the first reading of the Definition of Salary rules.
- Reason: HB 3138 (2007) added an option for employers to make non-elective contributions to 403(b) plans pursuant to ORS 243.820(3). This rule modification would clarify whether these types of contributions will be considered “salary” for PERS purposes.
- Subject: PERS definition of “salary.”
- Policy Issue: Should PERS change the definition of “salary” to exclude non-elective employer contributions to 403(b) plans?

### BACKGROUND AND POLICY ISSUE

HB 3138, as adopted by the 2007 Oregon legislature, added another type of contribution for employers to make to 403(b) plans pursuant to ORS 243.820(3). These optional contributions are described as non-elective employer contributions for educational institution employees.

*Policy Issue: Should PERS change the definition of “salary” to exclude non-elective employer contributions to 403(b) plans?*

This new type of contribution begs the question of whether such payments should be considered “salary” for PERS purposes. If it was, then PERS employer and employee contributions would be owed on that payment; if not, no PERS contributions would be triggered.

### PUBLIC COMMENT AND HEARING TESTIMONY

The public comment period ended on March 7, 2008 at 5:00 p.m. One comment was received from Greg Hartman, dated February 20, 2008, on behalf of the PERS Coalition. Mr. Hartman commented that the term “salary” is defined differently for the PERS Chapter 238 Program and OPSRP, and that these payments should be considered salary for one program but not the other.

The rule modifications are based on ORS 238.005(21)(b)(B), which includes in the definition of salary “The amount of participation in a tax-sheltered or deferred annuity” such as a 403(b) plan. This definition is silent on whether employer contributions should be considered “participation” in the tax-sheltered or deferred annuity. Hence, the rule specifies that this type of 403(b) contribution would not constitute “participation.” Revenue Ruling 840-74 explained that including nonelective employer contributions in the definition of salary may also affect other

aspects of the plan: "...inclusion of nonelective employer contributions under a tax sheltered annuity arrangement as compensation used to determine contributions or benefits to a pension plan may cause the pension plan to be discriminatory within the meaning of section 401(a)(4)."

In contrast, ORS 238.005(21)(b)(A) specifically includes employee and employer contributions to a deferred compensation plan as salary. This could be because nonelective employer contributions to a deferred compensation plan are included in the participant's annual deferred compensation contribution limit. This does not appear to also be true for nonelective employer contributions to a tax-sheltered or deferred annuity.

Under OPSRP, ORS 238A.005(16)(b)(B) includes employee and employer contributions to a tax-sheltered or deferred annuity as salary, but only when those contributions are made at the election of the employee. As the nonelective employer contributions are not made at the election of the employee, they would not be subject salary under OPSRP.

### LEGAL REVIEW

The attached rules were submitted to the Department of Justice for legal review. Any comments or changes will be incorporated before the rules are presented for adoption.

### IMPACT

Mandatory: No, the Board need not adopt the rules.

Impact: Clarify the PERS-related costs of additional 403(b) contributions allowed by HB 3183 for employers considering those contributions.

Cost: There are no discrete costs attributable to the rules.

### RULEMAKING TIMELINE

|                   |   |
|-------------------|---|
| January 15, 2008  | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.                        |
| February 1, 2008  | <i>Oregon Bulletin</i> published the Notice.  |
| February 15, 2008 | PERS Board notified that staff began the rulemaking process.  |
| February 26, 2008 | Public hearing held at 2:00 p.m. in Tigard  |
| March 7, 2008     | Public comment period ended at 5:00 p.m.  |
| March 28, 2008    | First reading of the rules.   |
| May 16, 2008      | Staff proposes adopting the permanent rule, including any amendments warranted by public comment or further research. |

### NEXT STEPS

The rule is scheduled to be brought before the PERS Board for adoption at the May 16, 2008, meeting.

B.5. Attachment 1 – OAR 459-005-0001, Definitions, Generally: Salary

B.5. Attachment 2 – OAR 459-070-0001, Definitions, Salary

B.5. Attachment 3 – Hartman letter dated February 20, 2008

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 5 – Administration**

1 **459-005-0001**

2 **Definitions, Generally**

3 The words and phrases used in chapter 459, Oregon Administrative Rules, have the  
4 same meaning given them in ORS 238.005 to 238.750. Specific and additional terms used  
5 in Chapter 459 generally are defined as follows unless context of a particular division or  
6 rule within this chapter requires otherwise:

7 (1) "Ad hoc" means one-time for a specific purpose, case, or situation without  
8 consideration of a broader application.

9 (2) "After-tax" contributions means:

10 (a) Member contributions required or permitted by ORS 238.200 or 238.515 which a  
11 participating employer has not elected to "pick up," assume or pay in accordance with  
12 ORS 238.205 and 238.515(b). "After-tax" contributions are included in the member's  
13 taxable income for purposes of state or federal income taxation at the time paid to PERS.  
14 "After-tax" contributions are included in computing FAS and in computing the  
15 employer's contributions paid to PERS.

16 (b) Payments made by a member to PERS for the purchase of additional benefits.

17 (3) "Before-tax" contributions means member contributions required or permitted by  
18 ORS 238.200 or 238.515 which a participating employer has elected to "pick up," assume  
19 or pay in accordance with ORS 238.205 and 238.515(b). "Before-tax" contributions are  
20 not included in the member's taxable income for purposes of state or federal income  
21 taxation at the time paid to PERS. "Before-tax" contributions are included in:

22 (a) Computing final average salary; and

1 (b) Computing the employer's contributions paid to PERS if the employer has  
2 elected to "pick up" the member contributions.

3 (4) "Calendar month" means the Julian Calendar beginning with the first calendar  
4 day of a month through the last calendar day of that month.

5 (5) "Casual worker" means an individual engaged for incidental, occasional,  
6 irregular, or unscheduled intervals or for a period of less than six consecutive calendar  
7 months.

8 (6) "Contributions" means any contributions required or permitted pursuant to ORS  
9 238.200 or 238.515.

10 (7) "Effective date of withdrawal" is the later of:

11 (a) The first day of the calendar month in which PERS receives the completed  
12 documents required of the member who is requesting a withdrawal of the member's  
13 regular account and variable account, if any; or

14 (b) The first day of the calendar month in which PERS receives the required notice  
15 of separation from the member's former employer(s).

16 (8) "Effective retirement date" means:

17 (a) For service retirements, the date described in OAR 459-013-0260; or

18 (b) For disability retirements, the date described in OAR 459-015-0015.

19 (9) "Elected official" means an individual who is a public official holding an elective  
20 office or an appointive office with a fixed term for the state or for a political subdivision  
21 of the state who has elected to participate in PERS pursuant to ORS 238.015(5).

22 (10) "Emergency worker" means an individual engaged in case of emergency,  
23 including fire, storm, earthquake, or flood.



1 (11) "Employee" has the same meaning as provided in ORS 238.005(7) and shall be  
2 determined in accordance with OAR 459-010-0030.

3 (a) For the purposes of ORS 238.005 to 238.750 the term "employee" includes  
4 public officers whether elected or appointed for a fixed term.

5 (b) The term "employee" does not include:

6 (A) A member of the governing board of a political subdivision unless the individual  
7 qualifies for membership under ORS 238.015.

8 (B) An individual who performs services for a public employer as a contractor in an  
9 independently established business or as an employee of that contractor in accordance  
10 with OAR 459-010-0030.

11 (C) An individual providing volunteer service to a public employer without  
12 compensation for hours of service as a volunteer, except for volunteer firefighters who  
13 establish membership in accordance with ORS 238.015(6).

14 (12) "Employer contribution account" means a record of employer contributions to  
15 the Fund, as required by ORS 238.225(1), and investment earnings attributable to those  
16 contributions, that the Board has credited to the account after deducting amounts required  
17 or permitted by ORS Chapter 238.

18 (13) "Employment" is compensated service to a participating employer as an  
19 employee whose:

20 (a) Period or periods of employment includes only the actual hours of compensated  
21 service with a participating employer as an employee; and

22 (b) Compensated service includes, but is not limited to, paid vacation, paid sick  
23 leave, or other paid leave.

1            (14) "Estimate" means a projection of benefits prepared by staff of a service or  
2            disability retirement allowance, a death or a refund payment. An estimate is not a  
3            guarantee or promise of actual benefits that eventually may become due and payable, and  
4            PERS is not bound by any estimates it provides. (ORS 238.455(6))

5            (15) "FAS" and "final average salary" have the same meaning as provided in:

6            (a) ORS 238.005(8) for all PERS Tier One members;

7            (b) ORS 238.435(2) for all PERS Tier Two members who are not employed by a  
8            local government as defined in ORS 174.116;

9            (c) ORS 238.435(4) for all PERS Tier Two members who are employed by a local  
10           government as defined in ORS 174.116; or

11           (d) ORS 238.535(2) for judge members of PERS for service as a judge.

12           (16) "General service member" means membership in PERS as other than a judge  
13           member, a police officer, a firefighter, or a legislator.

14           (17) "Good cause" means a cause beyond the reasonable control of an individual.  
15           "Good cause" exists when it is established by satisfactory evidence that factors or  
16           circumstances are beyond the reasonable control of a rational and prudent individual of  
17           normal sensitivity, exercising ordinary common sense.

18           (18) "Independent contractor" means an individual or business entity that is not  
19           subject to the direction and control of the employing entity as determined in accordance  
20           with OAR 459-010-0032.

21           (19) "Judge member" has the same meaning as provided in 238.500(3). For purposes  
22           of this chapter, active, inactive, and retired membership of a judge member shall have the  
23           same meaning as ORS 238.005(12)(b), (c), and (d), respectively.

1 (20) "Legislator" means an individual elected or appointed to the Oregon Legislative  
2 Assembly who has elected to participate in PERS pursuant to ORS 238.015(5) as a  
3 member of the Oregon Legislative Assembly as provided in ORS 238.068.

4 (21) "Member cost" means after-tax member contributions and payments made by  
5 or on behalf of a member to purchase additional benefits.

6 (22) "Participating employer" means a public employer who has one or more  
7 employees who are active members of PERS.

8 (23) "PERS" and "system" have the same meaning as the Public Employees  
9 Retirement System in ORS 238.600.

10 (24) "Qualifying position" has the same meaning as provided in ORS 238.005(19).

11 (25) "Regular account" means the account established under ORS 238.250 for each  
12 active and inactive member who has made contributions to the Fund or the account of an  
13 alternate payee of such a member.

14 (26) "Salary" has the same meaning as provided in ORS 238.005(21).

15 **(a) For Tier One and Tier Two members, contributions made pursuant to ORS**  
16 **243.820(3) are not considered salary.**

17 ***([a]b)*** For a Tier One member, a lump sum payment for accrued vacation pay is  
18 considered salary:

19 (A) In determining employee and employer contributions.

20 (B) In determining final average salary for the purpose of calculating PERS benefits.

21 ***([b]c)*** For a Tier Two member, a lump sum payment for accrued vacation pay:

22 (A) Is considered salary in determining employee and employer contributions.

1 (B) Is not considered salary in determining final average salary for the purpose of  
2 calculating PERS benefits.

3 (27) "Seasonal worker" means an individual whose engagement is characterized as  
4 recurring for defined periods that are natural divisions of the employer's business cycle or  
5 services.

6 (28) "Staff" means the employees of the Public Employees Retirement System as  
7 provided for in ORS 238.645.

8 (29) "Tier One member" means a member who established membership in the  
9 system before January 1, 1996, as defined in ORS 238.430(2).

10 (30) "Tier Two member" means a member who established membership in the  
11 system on or after January 1, 1996, in accordance with ORS 238.430.

12 (31) "Vacation pay" means a lump sum payment for accrued leave in a Vacation  
13 Leave Program provided by a public employer which grants a period of exemption from  
14 work for rest and relaxation with pay, and does not include:

15 (a) Sick leave programs;

16 (b) Programs allowing the accumulation of compensatory time, holiday pay or other  
17 special leaves unless the public employer's governing body indicates by resolution,  
18 ordinance, or other legislative process, that such leave is intended to serve as additional  
19 vacation leave; and

20 (c) Other programs, such as a Personal Time Off (PTO) plan, which are a  
21 combination of vacation, sick, bereavement, personal and other leaves of pay as defined  
22 and described by a public employer unless the employer has a written policy that clearly  
23 indicates the percentage of the plan that represents vacation leave. If the employer's PTO

1 has a cash option, the employer shall report to PERS the amount of any lump sum pay-off  
2 for the percentage that represents vacation leave.

3 (32) "Variable account" and "member variable account" mean the account in the  
4 Variable Annuity Account established under ORS 238.260(2) for each active and inactive  
5 member who has elected to have amounts paid or transferred into the Variable Annuity  
6 Account.

7 (33) "Variable Annuity Account" means the account established in ORS 238.260(2).

8 (34)(a) "Volunteer" means an individual who performs a service for a public  
9 employer, and who receives no compensation for the service performed.

10 (b) The term "volunteer" does not include an individual whose compensation  
11 received from the same public employer for similar service within the same calendar year  
12 exceeds the reasonable market value for such service.

13 (35) "Year" means any period of 12 consecutive calendar months.

14 (36) The provisions of this rule are effective January 1, 2003.

15 Stat. Auth.: ORS 238.650

16 Stats. Implemented: ORS Chapters 238, 238A & 243.820

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459**

**DIVISION 70 – Oregon Public Service Retirement Plan, Generally**

1 **459-070-0001**

2 **Definitions**

3 The words and phrases used in this Division have the same meaning given them in ORS  
4 238A.005 unless otherwise indicated. Specific and additional terms for purposes of  
5 Divisions 70, 75 and 80 are defined as follows unless context requires otherwise:

6 (1) "Academic employee of a community college" means an instructor who teaches  
7 classes offered for college-approved credit or on a non-credit basis.

8 (a) Librarians, counselors, and aides in non-teaching positions, tutors, or other non-  
9 teaching faculty, and classified, professional or nonprofessional support staff are not  
10 academic employees for the purposes of section 20 of OL 2005 Ch. 332, but are subject  
11 to the membership requirements under ORS 238A.100 and OAR 459-075-0010.

12 (b) The governing body of a community college shall determine who is an academic  
13 employee in its employ under this rule. In making that determination, a community  
14 college shall consider all disciplines (academic activity) collectively when an employee's  
15 assignment includes multiple disciplines.

16 (2) "Calendar month" means a full month beginning on the first calendar day of a  
17 month and ending on the last calendar day of the same month.

18 (3) "Calendar year" means 12 calendar months beginning on January 1 and ending  
19 on December 31 following.

20 (4) "Employee" has the same meaning as "eligible employee" in ORS 238A.005(4).

1 (5) "Employee class" means a group of similarly situated employees whose  
2 positions have been designated by their employer in a policy or collective bargaining  
3 agreement as having common characteristics.

4 (6) "Employee contributions" means contributions made to the individual account  
5 program by an eligible employee under ORS 238A.330, or on behalf of the employee  
6 under ORS 238A.335.

7 (7) "Final Average Salary" (FAS) has the same meaning given the term in:

8 (a) ORS 238A.130(1) for OPSRP Pension Program members who are not employed  
9 by a local government as defined in ORS 174.116; or

10 (b) ORS 238A.130(3) for OPSRP Pension Program members who are employed by  
11 a local government as defined in ORS 174.116.

12 (8) "Member" has the same meaning given the term in ORS 238A.005(10).

13 (9) "Member account" means the account of a member of the individual account  
14 program.

15 (10) "Member of PERS" has the same meaning as "member" in ORS  
16 238.005(12)(a), but does not include retired members.

17 (11) "OPSRP" means the Oregon Public Service Retirement Plan.

18 (12) "Overtime" means the salary or hours, as applicable, that an employer has  
19 designated as overtime.

20 (13) "Partial year of separation" means a period in the calendar year the employee  
21 separates from employment that begins on January 1 of the year and ends before the last  
22 working day of the year.

1 (14) "Qualifying position" means a position designated by the employer as  
2 qualifying, except:

3 (a) A position or concurrent positions in which an employee performs at least 600  
4 hours of service in a calendar year is qualifying regardless of employer designation.

5 (b) A position in a partial year of separation is qualifying regardless of employer  
6 designation if the position is continued from an immediately preceding calendar year in  
7 which the employee performed at least 600 hours of service in the position or concurrent  
8 positions.

9 (c) A position with one employer in which the employee is employed for the entire  
10 calendar year and fails perform at least 600 hours of service in that position or concurrent  
11 positions in the calendar year is non-qualifying regardless of employer designation.

12 (15) "Salary" has the same meaning given the term in ORS 238A.005(16)[.], except  
13 “salary” does not include contributions made pursuant to ORS 243.820(3).

14 (16) "School employee" has the meaning given the term in ORS 238A.140(7).

15 (17) "Service" means a period in which an employee:

16 (a) Is in an employer/employee relationship, as defined in OAR 459-010-0030; and

17 (b) Receives a payment of "salary," as defined in ORS 238.005A(16) or similar  
18 payment from workers' compensation or disability.

19 (18) The provisions of this rule are effective on January 1, 2004.

20 Stat. Auth.: ORS 238A.450

21 Stats. Implemented: ORS 238A.005, 238A.025, 238A.140, 238A.330 & 238A.335,

22 OL 2007 Ch. 769



B.2. Attachment 3

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February 20, 2008

*BY EMAIL AND FIRST CLASS MAIL*

Steve Rodeman  
Public Employee Retirement System  
PO Box 23700  
Tigard, OR 97281-3700

Re: Rulemaking: OAR 459-005-0001 and OAR 459-070-0001  
Our File No.: 5415-237

Dear Steve:

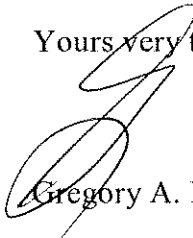
The purpose of this letter is to comment on the above rules under consideration by the PERS board on behalf of the PERS Coalition. As you indicate in your February 15, 2008 memo the 2007 legislative session expanded the enabling statute for 403(b) plans to authorize educational institutions to make non-elective contributions in these plans. House Bill 3183 contains no mandates, it simply authorizes an additional form of 403(b) contributions. As its name suggests a non-elective contribution is one which does not involve an election by an individual employee to direct some portion of their salary to the 403(b) plan. The somewhat sparse legislative history which accompanies the bill indicates that there was a desire to give educational institutions more flexibility regarding participation in 403(b) plans.

The definitions of salary in PERS (Tier One and Tier Two) and OPSRP are significantly different in regard to whether these non-elective contributions should be regarded as salary. ORS 238.005(21)(b) states clearly and unequivocally that employee and employer contributions which are paid to deferred compensation or deferred annuity plans are to be considered salary. In contrast ORS 238A.005(16) recognizes that employer and employee payments into deferred compensation and annuity plans are salary only to the extent that they are made at the election of the employee. Based on the contrasting statutes non-elective contributions to a 403(b) plan should be considered salary under PERS (Tier One and Tier Two) and not salary under OPSRP. The February 15, 2008 memo makes some cryptic reference to closely analogous payments not being treated as salary, however a straightforward application of the language of ORS Chapter 238 and ORS Chapter 238A should resolve the issue of how to treat these non-elective 403(b) contributions.

Steve Rodeman  
February 20, 2008  
Page 2

Based on the statutory analysis the proposal which would treat non-elective 403(b) contributions as non-salary is inconsistent with ORS Chapter 238 and should be amended accordingly.

Yours very truly,



Gregory A. Hartman

GAH:kaj

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cc: PERS Coalition



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

Headquarters:  
11410 S.W. 68<sup>th</sup> Parkway, Tigard, OR  
Mailing Address:  
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[www.oregon.gov/pers](http://www.oregon.gov/pers)

March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
SUBJECT: Adoption of Administrative Review and Appeal Processes Rules  
OAR 459-001-0030, *Review of Staff Actions and Determination*  
OAR 459-001-0035, *Contested Case Hearing*  
OAR 459-001-0040, *Petitions for Reconsideration*

|              |   |
|--------------|---|
| MEETING DATE | <b>3/28/08</b>                          |
| AGENDA ITEM  | <b>B.3.<br/>Review/Appeal Processes</b> |

### OVERVIEW

- Action: Adopt modifications to Administrative Review and Appeal Processes rules.
- Reason: The rule modifications clarify employer grievance procedures.
- Subject: PERS administrative review and appeal processes.
- Policy Issue: *Should employers have a specific process to follow to seek review or appeal of staff actions and determinations?*

### BACKGROUND

Last year, PERS began rulemaking on OAR 459-001-0030, -0035, and -0040 relating to reviews of staff determinations, contested cases, and petitions for reconsideration. Those original rule modifications were proposed to conform to DOJ model rules and eliminate overlap and duplicative authorities.

During that rulemaking, the Employers PERS Alliance raised several concerns relating to these processes as they applied to PERS employers. After further development and consideration, parallel rulemaking was started to better address the issues raised. Agenda items B.4. and B.5. are related rulemakings that were started to allow for rule modifications that create a different dispute review and resolution process for employers from that used for member disputes.

### SUMMARY OF MODIFICATIONS TO RULES SINCE FIRST READING

As a result of moving some related issues to parallel rulemaking processes, the modifications to these rules have been scaled back. A separate rule was proposed to address employer disputes (item B.4.) and the scope of OAR 459-001-0030 was restored back to only cover non-employer disputes. The issues that the Employers PERS Alliance raised related to prior period contributions were moved to yet a third rulemaking (item B.5.).

The draft modifications to OAR 459-001-0030 reflected in the attachment to this memo represent staff's recommended changes in light of the shift of issues to other rules. What's remained in this rulemaking, then, are in substance the originally proposed changes to conform to DOJ's model and other process improvements.

### PUBLIC COMMENT AND HEARING TESTIMONY

The public comment received through the process to this point has principally addressed issues now covered in the other two agenda items (B.4. and B.5.). A rulemaking hearing was held on January 22, 2008. No one attended. Public comment closed on February 22, 2008, at 5:00 p.m. One comment was received.

PERS received a memo from Lori Sattenspiel with the Oregon School Boards Association dated January 22, 2008 on behalf of the Employers PERS Alliance, which is attached. Both this rule and OAR 459-001-0032 address how the review process is initiated by the respective parties. The deadline for initiating that process runs from when the affected party is mailed an explanation of the action or determination, which sets forth appeal rights. Interested parties can intervene in any resulting contested case under the Attorney General’s model rules. The language change on “shall” was made consistent; no further changes appear to be warranted.

Regarding OAR 459-001-0035, the language on informal conferences has been restored. As to how a person intervenes as a party, that process is spelled out in the model rules, which PERS has expressly adopted. Lastly, there are purposefully no specific content requirements for a “written argument” to allow flexibility in addressing issues and whether a late petition should be considered is already addressed in PERS’ rules in general on when documents can be considered to be timely submitted.

### LEGAL REVIEW

The rules were submitted to the Department of Justice for legal review. Any comments or changes are incorporated in the rules as presented for adoption.

### IMPACT

Mandatory: No, the Board need not adopt the rules.

Impact: Clarification of the process in light of DOJ model rules.

Cost: There are no discrete costs attributable to the rules.

### RULEMAKING TIMELINE

|                    |  |
|--------------------|--|
| April 13, 2007     | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State. |
| May 1, 2007        | <i>Oregon Bulletin</i> published the Notice.   |
| May 18, 2007       | PERS Board notified that staff began the rulemaking process.                                   |
| May 22, 2007       | Rulemaking hearing held at 2:00 p.m. in Tigard.  |
| June 15, 2007      | First Reading of the rules.  |
| June 22, 2007      | Initial public comment period ended at 5:00 p.m.   |
| September 21, 2007 | Second Reading of the rules.   |
| September 30, 2007 | Re-opened public comment period expired at 5:00 p.m.   |

Adoption – Review/Appeal Processes Rules

03/28/2008

Page 3 of 3

October 19, 2007 Third Reading of the rules was postponed to November 16, 2007.  
November 16, 2007 Third Reading of the rules was postponed to February 15, 2008.  
December 15, 2007 Rule Re-noticed to Secretary of State.  
January 22, 2008 Rulemaking hearing held in Tigard.  
February 15, 2008 Third Reading of the rule.  
February 22, 2008 Public comment period ended at 5:00 p.m.  
March 28, 2008 Board may adopt the permanent rules.

BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt modifications to OAR 459-001-0030, 459-001-0035 and 459-001-0040, as presented.”
2. Direct staff to make other changes to the rules or explore other options.

STAFF RECOMMENDATIONS

Staff recommends the Board choose Option #1.

- Reason: The rule modifications clarify employer grievance procedures.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

- B.1. Attachment 1 - OAR 459-001-0030, Staff Actions & Determinations Regarding Persons  
B.1. Attachment 2 - OAR 459-001-0035, Contested Case Hearing  
B.1. Attachment 3 - OAR 459-001-0040, Petitions for Reconsideration  
B.1. Attachment 4 – Sattenspiel letter dated January 22, 2008

OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 001 – PROCEDURAL RULES

1 459-001-0030

2 Review of Staff Actions and Determinations Regarding Persons

3 (1) For purposes of this rule, “Director” means the executive director of PERS,  
4 or an administrator appointed by the executive director.

5 ~~[(1)]~~(2) Request for review. Any person ~~[or public employer]~~ may file with the  
6 Director a request for review of a staff action or determination, except ~~[. Except]~~ as  
7 provided for in ORS 238.450 or in Board rules on disability retirement. ~~[, oral or written~~  
8 ~~staff actions or determinations that are subject to review under this rule include but are~~  
9 ~~not limited to:~~

- 10 ~~(a) Establishing membership;~~
- 11 ~~(b) Determining service credit and final average salary;~~
- 12 ~~(c) Refund of contributions;~~
- 13 ~~(d) Eligibility for benefits;~~
- 14 ~~(e) Computation of benefits;~~
- 15 ~~(f) Penalty for late reporting.]~~

16 The request ~~[shall]~~ must be filed within 60 days following the date ~~[of]~~ the staff action or  
17 determination is sent to the person ~~[or public employer]~~ requesting review. ~~[Late~~  
18 ~~requests may be considered only if facts constituting good cause are alleged in the~~  
19 ~~request.]~~

20 ~~[(2)]~~(3) Informal conferences. Informal conferences are available as an alternative  
21 means that may achieve resolution of any matter under review. A request for an informal

1 conference does not change the time limit to file a request for review.*[relieve a person*  
2 *of the requirements for timely filing of a review request.]*

3 *[(3)](4)* Criteria for request. A request for review of a staff action or determination  
4 *[shall]must* be in writing and set forth:

5 (a) A description of the staff action or determination for which review is requested;

6 (b) A short statement of the manner in which the action is alleged to be in error;

7 (c) A statement of facts that are the basis of the request;

8 (d) Reference to applicable statutes, rules or court decisions relied upon *[upon*  
9 *which the person relies];*

10 (e) A statement of the relief requested *[the request seeks];* and

11 (f) A request for review.

12 *[(4)](5)* Denial of request. The Director*[, or an administrator appointed by the*  
13 *Director,]* may deny any request for review within 45 days of receipt of the request  
14 *[made pursuant to this rule]:*

15 (a) *[Which] If the request* does not contain the information required under section  
16 *[(3)](4)* of this rule; or

17 (b) When *[Regarding which]*, in the Director's view, there is no bona fide dispute of  
18 material fact, the pertinent statutes and rules are clear in their application to the facts, and  
19 there *[was not a] is no* material administrative error.

20 *[(c) The denial of the request shall be made within 45 days of receipt of the*  
21 *member's request].*

22 *[(5)](6)* If a request is denied by the Director*[, or an administrator appointed by the*  
23 *Director,]* because it does not contain the information required under section *[(3)](4)* of

1 this rule, a *[person shall]***requester will** have one opportunity to correct that deficiency  
2 and resubmit a request for review within 45 days of the date of denial.

3 *[(6)](7)* Approval of request. If the request for review is granted, the Director*[, or an*  
4 *administrator appointed by the Director, shall]* **must** issue a written determination within  
5 45 days of receipt of the *[member's]* request after:

- 6 (a) Considering the request;  
7 (b) Directing staff to reconsider; or  
8 (c) Directing staff to schedule an informal *[hearing]***conference**.

9 *[(7) Contested case hearing. In lieu of issuing a written determination, the Director*  
10 *may direct the staff to schedule a formal contested case hearing. Such hearing shall be*  
11 *conducted in accordance with OAR 459-001-0035.]*

12 *[(8) If a request is denied or the Director's determination is not the relief sought by*  
13 *the requester, and the Director did not cause a contested case hearing to be scheduled, a*  
14 *person may file with the Board a request for a contested case hearing pursuant to OAR*  
15 *459-001-0035.]*

16 *[(9)](8)* Extension of deadline. Any 45-day deadline within this rule may be  
17 extended upon request in writing for an additional 45 days. *[Additional time may be*  
18 *requested, but shall only be granted upon approval by both parties.]*

19 **(9) Resolution process.**

20 **(a) In lieu of issuing a written determination, the Director may direct staff to**  
21 **schedule a formal contested case hearing. The hearing must be conducted in**  
22 **accordance with the Attorney General's Model Rules of Procedure.**



1        (b) If a request is denied or the Director's determination is not the relief sought  
2        by the person, and the Director did not cause a contested case hearing to be  
3        scheduled, a person may file with the Board a request for a contested case hearing  
4        pursuant to the Attorney General's Model Rules of Procedure.

5        Stat. Auth.: ORS ~~237.263~~238.650

6        Stats. Implemented: ORS 183.413 - 183.470

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 001 – PROCEDURAL RULES**

1 **459-001-0035**

2 **Contested Case Hearing**

3 (1) Request for a contested case hearing. To obtain review of any determination *[by*  
4 *the Director,]*made under OAR 459-001-0030 or 459-001-0032 for which a contested  
5 case hearing has not been held, the party *[shall]*must file with the Board a  
6 *[petition]*request for a contested case hearing. The *[petition shall]* request must be filed  
7 within 45 days following the date of the Director's determination. *[Late petitions may be*  
8 *considered only if facts constituting a good cause are alleged in the petition.]*

9 (2) Informal conferences. Informal conferences are available as an alternative means  
10 that may achieve resolution of any matter under review. A request for an informal  
11 conference does not relieve a person of the requirements for timely filing of a request for  
12 a contested case hearing.

13 (3) Criteria for request. The *[petition]*request for a contested case hearing *[shall]*  
14 must be in writing and set forth:

15 (a) A description of the determination for which review is requested;

16 (b) A short statement of the manner in which the determination is alleged to be in  
17 error;

18 (c) A statement of facts that are the basis of the *[petition]*request;

19 (d) Reference to applicable statutes, rules or court decisions upon which the  
20 *[petitioner]*requester relies;

21 (e) A statement of the action the *[petition]*request seeks; and

22 (f) A request for a hearing.

1        *[(4) Contested case hearing. The Board shall acknowledge receipt of a petition for a*  
2 *contested case hearing within 15 days of filing.]*

3        *[(5)](4)* The Director, or an administrator appointed by the Director, may direct the  
4 staff to schedule a formal contested case hearing or develop a recommendation to deny  
5 the member's request to be presented to the Board. The Board may then deny a request  
6 for a hearing when it has decided, in consultation with legal counsel, that the Board has  
7 no authority to grant the relief requested.

8        *[(6)](5)* The hearing *[shall] must* be conducted in accordance with the Attorney  
9 General's Model Rules of Procedure. Parties to the hearing will include the requester,  
10 any other person named as a party, and any other person who petitions to  
11 participate and is determined to have an interest in the outcome of the proceeding.

12        *[(7) Proposed order. The administrative law judge's proposed order becomes final*  
13 *90 days following service upon the petitioner, the Director and the Board through the*  
14 *Director. Exceptions to the proposed order by the Director or the petitioner must be filed*  
15 *with the Hearing Officer administrative law judge within 45 days of service. If the Board*  
16 *determines additional time is necessary to review a proposed order and issue an*  
17 *amended order, the Board may extend the time after which the proposed order will*  
18 *become final in accordance with ORS 183.464(3).]*

19        *[(8) In accordance with the Attorney General's Model Rules of Procedure, the Board*  
20 *may reject the order and direct the Hearings Officer to conduct further proceedings and*  
21 *prepare an amended order within the time specified by the Board.]*

1        *[(9) Extension of deadline. Any 45-day deadline within this rule may be extended*  
2 *upon request in writing for an additional 45 days. Additional time may be requested, but*  
3 *shall only be granted upon approval by both parties.]*

4        ~~[(10)]~~(6) The Board ~~[will]~~ generally deliberatess and decidess on final orders during  
5 regularly scheduled board meetings. The Board may instead deliberate and decide at any  
6 other time and place allowed by law, as determined on a case-by-case basis, such as  
7 electronically or via a telephone conference.

8        Stat. Auth.: ORS 238.650, 183.464 & 183.600 - 183.690

9        Stats. Implemented: ORS 183.413 - 183.470

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 001 – PROCEDURAL RULES**

1 **459-001-0040**

2 **Petitions for Reconsideration**

3 (1) *[Request for a]* Petition for reconsideration. *[Prior to]* **Before** initiating any  
4 judicial review of a final order in a contested case, a party may file with the Board a  
5 petition for reconsideration. If the party chooses to file a petition, it *[shall]* **must** be filed  
6 within 60 days following the date the order becomes final. **Written argument from a**  
7 **petitioner must be submitted with the petition.** *[Late petitions may be considered only*  
8 *if facts constituting good cause are alleged in the petition.]*

9 *[(2) Criteria for request. The petition for reconsideration shall be in writing and set*  
10 *forth:]*

11 *[(a) A short statement of the manner in which the final order is alleged to be in*  
12 *error;]*

13 *[(b) Reference to applicable statutes, rules or court decisions on which the party*  
14 *relies;]*

15 *[(c) A suggested alternative form of order; and]*

16 *[(d) A request for reconsideration.]*

17 *[(3)]* **(2)** Board action. The Board *[shall]* **may** either grant or deny a petition for  
18 reconsideration within 60 days of filing. **If the Board does not grant or deny the**  
19 **petition within 60 days of filing, the petition shall be deemed denied.** *[A petition may*  
20 *be denied if it does not contain the information required under section (2) of this rule. If*  
21 *the petition for reconsideration is granted, the Board may:]*

22 *[(a) Affirm the original order; or]*

1 *[(b) Reconsider and issue an amended order.]*

2 *[(4)](3)* Staff action. If the petition for reconsideration is granted *[and the Board*  
3 *reconsiders]*, the *[Director shall submit]* Board must enter a new final order in  
4 accordance with OAR 137-003-0675 and may consider written argument from the  
5 Director on the merits of the petition *[for Board consideration]*. The Board may  
6 schedule oral argument in its discretion.

7 *[(5)Petitioner action. Written argument from a petitioner shall be submitted together*  
8 *with the petition. The Board may schedule oral argument in its discretion.]*

9 *[(6) Extension of deadline. Any 60-day deadline within this rule may be extended*  
10 *upon request in writing for an additional 45 days. Additional time may be requested, but*  
11 *shall only be granted upon approval by both parties.]*

12 Stat. Auth.: ORS 238.650

13 Stats. Implemented: ORS 183.413 - 183.470, 183.482



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## **REVIEW OF PERS RULES UP FOR PUBLIC HEARING - JANUARY 22, 2008**

### **459-001-0030 – Review of Staff Actions and Determinations Regarding Persons**

Page 1, line 17 – states that the notice is to be sent to “the person”, but what if a public employer disagrees with PERS’ determination regarding the “person” i.e. member, former member, retiree. How will a public employer know? This is also not addressed in the proposed changes to OAR 459-001-0032.

Page 3, line 1 – “shall” should be changed to “must” to be consistent with the rest of OAR 459.

### **459-001-0035 – Contested Case Hearing**

Page 1, line 10 - the statement that a request for an informal conference does not relieve a person of the time requirements for filing a contested case hearing is being removed. However, it is still in OARs 459-001-0030 and 0030. The appeals process is very confusing, even for attorneys and employers. Notification that the informal conference process is a different process and does not relieve a person from the time requirements for a contested case is important information to get out. If it is being removed from this rule, why not the other rules noted above?

Page 2, line 10 – sets out who may be a party to a contested case hearing and that “any person who petitions to participate” may be a party, but does not state how a person petitions or when. Must a person/employer intervene before the hearing? If so, when? The rule is not clear how a party is to do this. In some cases an employer may want to intervene, especially in disability cases.

### **459-001-0040 – Petitions for Reconsideration**

Page 1, line 6 – requires a petitioner to submit ‘written argument’ with a petition. “written argument” is not defined, i.e. if written argument is required, the rule should set forth what the argument should include

Page 1, line 7 – the provision for considering late petitions is being removed. Are late petitions no longer going to be considered for good cause?

Lori Sattenspiel  
Legislative and Public Affairs Specialist  
Oregon School Boards Association



# Oregon

Theodore R. Kulongoski, Governor

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
SUBJECT: First Reading and Adoption of OAR 459-001-0032,  
*Review of Staff Actions and Determinations for  
Employers*

|                 |   |
|-----------------|---|
| MEETING<br>DATE | <b>03/28/2008</b>                           |
| AGENDA<br>ITEM  | <b>B.4.<br/>Review/Appeal<br/>Processes</b> |

### OVERVIEW

- Action: Adopt Review of Staff Actions and Determinations for Employers rule.
- Reason: The Employers PERS Alliance submitted a request for separate employer and employee procedures to review staff actions and determinations.
- Subject: PERS administrative review and appeal processes.
- Policy Issue: Should employers have a separate process to follow to seek review or appeal of staff actions and determinations?

### BACKGROUND

After staff began rulemaking on the staff determination, contested case, and appeal rules (see Agenda Item B.3.), the Employers PERS Alliance requested that PERS staff consider a different dispute review and resolution process from that used for member disputes for those challenges made by employers. Originally, PERS staff proposed to incorporate those provisions into the rules then open for rulemaking (OARs 459-001-0030, 459-001-0035, and 459-001-0040). Upon further review and consideration, however, staff is now proposing that the separate employer review process be contained in a new rule, OAR 459-001-0032.

### POLICY ISSUE

*Should employers have a separate process to follow to seek review or appeal of staff actions and determinations?*

A separate rule for employer disputes does make sense given the nature of the disputes with employers and non-employers are different. Also, the State of Oregon has a dispute resolution procedure that state agencies are required to follow, so those disputes already have to follow a particular path different from non-employer disputes. Staff consequently developed this new rule that incorporates those provisions originally embedded in OAR 459-001-0030 to address employer disputes. These separate provisions would provide employers the option they requested to have their dispute resolved through arbitration, mediation, or contested case, at their election.



### PUBLIC COMMENT AND HEARING TESTIMONY

A public rulemaking hearing was held on January 22, 2008, at PERS headquarters in Tigard. No one attended. The public comment period ended on February 22, 2008 at 5:00 p.m. PERS received one public comment.

PERS received a memo from Lori Sattenspiel with the Oregon School Boards Association dated January 22, 2008 on behalf of the Employers PERS Alliance, which is attached. Both this rule and OAR 459-001-0030 address how the review process is initiated by the respective parties. The deadline for initiating that process runs from when the affected party is mailed an explanation of the action or determination, which sets forth appeal rights. Interested parties can intervene in any resulting contested case under the Attorney General’s model rules. No further changes appear to be warranted.

### LEGAL REVIEW

The attached rule was submitted to the Department of Justice for legal review. Any comments or changes are incorporated in the rule as presented for adoption.

### IMPACT

Mandatory: No, the Board need not adopt the rule.

Impact: Establishes a separate process for employers to seek review of a staff action or determination, ensuring that the review occurs in the proper forum and in a manner better suited to employer concerns.

Cost: There are no discrete costs attributable to the rule.

### RULEMAKING TIMELINE

|                   |  |
|-------------------|--|
| November 11, 2007 | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State. |
| December 1, 2007  | <i>Oregon Bulletin</i> published the Notice.   |
| January 22, 2008  | Rulemaking hearing held at 2:00 p.m. in Tigard.  |
| February 15, 2008 | PERS Board notified that staff began the rulemaking process.                                   |
| February 22, 2008 | Public comment period ended at 5:00 p.m.   |
| March 28, 2008    | First Reading and Board may adopt the permanent rule.  |

### BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt OAR 459-001-0032, as presented.”
2. Direct staff to make other changes to the rule or explore other options.

**STAFF RECOMMENDATION**

Staff recommends the Board choose Option #1.

- Reason: The Employers PERS Alliance submitted a request for separate employer and employee procedures to review staff actions and determinations.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is warranted.

B.3. Attachment 1 – OAR 459-001-0032, Review of Staff Actions and Determinations Regarding Employers

B.3. Attachment 2 – Sattenspiel letter dated January 22, 2008

OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 001 – PROCEDURAL RULES

1 459-001-0032

2 Review of Staff Actions and Determinations Regarding Public Employers

3 (1) For purposes of this rule, “Director” means the executive director of PERS,  
4 or an administrator appointed by the executive director.

5 (2) Request for review. Any public employer may file with the Director a  
6 request for review of a staff action or determination, except as provided in ORS  
7 238.450 or in Board rules on disability retirement. The request must be filed within  
8 60 days following the date the staff action or determination is sent to the public  
9 employer requesting review.

10 (3) Informal conferences. Informal conferences are available as an alternative  
11 means that may achieve resolution of any matter under review. A request for an  
12 informal conference does not change the time limit to file a request for review.

13 (4) Criteria for request. A request for review of a staff action or determination  
14 must be in writing and set forth:

15 (a) A description of the staff action or determination for which review is  
16 requested;

17 (b) A short statement of the manner in which the action is alleged to be in error;

18 (c) A statement of facts that are the basis of the request;

19 (d) Reference to applicable statutes, rules or court decisions relied upon;

20 (e) A statement of the relief requested; and

21 (f) A request for review.

1 (5) Denial of request. The Director may deny any request for review within 45  
2 days of receipt of the request:

3 (a) If the request does not contain the information required under section (4) of  
4 this rule; or

5 (b) When, in the Director's view, there is no bona fide dispute of material fact,  
6 the pertinent statutes and rules are clear in their application to the facts, and there  
7 is no material administrative error.

8 (6) If a request is denied by the Director because it does not contain the  
9 information required under section (4) of this rule, a requester will have one  
10 opportunity to correct that deficiency and resubmit a request for review within 45  
11 days of the date of denial.

12 (7) Approval of request. If the request for review is granted, the Director must  
13 issue a written determination within 45 days of receipt of the request after:

14 (a) Considering the request;

15 (b) Directing staff to reconsider; or

16 (c) Directing staff to schedule an informal conference.

17 (8) Extension of deadline. Any 45-day deadline within this rule may be extended  
18 upon request in writing for an additional 45 days.

19 (9) Resolution process for state agency employers. If a request is denied or the  
20 Director's determination is not the relief sought by the employer, and the employer  
21 is a state agency subject to the dispute resolution provisions of OAM policy  
22 35.70.30.PO, the Interagency Dispute Resolution Process, then the dispute must be  
23 resolved in accordance with that policy.

1 (10) Resolution process for non-state agency employers. If a request is denied or  
2 the Director's determination is not the relief sought by the employer, and the  
3 employer is not a state agency subject to the dispute resolution provisions of OAM  
4 policy 35.70.30.PO, then the employer can request the issue to be addressed by  
5 arbitration, mediation, or a contested case.

6 (a) If the employer requests arbitration, PERS and the employer will as closely  
7 as possible parallel the process outlined in OAM policy 35.70.30.PO for state agency  
8 employers.

9 (b) If the employer requests a contested case, the process will be conducted  
10 pursuant to the Attorney General's Model Rules of Procedure.

11 Stat. Auth.: ORS 238.650

12 Stats. Implemented: ORS 183.413 - 183.470



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**REVIEW OF PERS RULES UP FOR PUBLIC HEARING -  
JANUARY 22, 2008**

**459-001-0032 – Review of Staff Actions and Determinations Regarding  
Public Employers**

Page 1, line 6 – states that a public employer may file for review of “a staff action or determination,” but only after the determination is sent to the public employer. What if nothing is sent? I.e. what if it is a PERS staff action that the employer disagrees with, but no determination is sent? What if a determination is sent to an employee or former employee – will it be sent to the employer as well? (NOTE: same concern as in OAR 459-001-0030 – it is not addressed in that rule either.)

Page 2, line 9 – “shall” should be changed to “will” to be consistent with the rest of OAR 459.

Lori Sattenspiel  
Legislative and Public Affairs Specialist  
Oregon School Boards Association



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Theodore R. Kulongoski, Governor

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
SUBJECT: Adoption of OAR 459-009-0130, *Employee Contributions for Prior Periods*

|              |                                |
|--------------|--------------------------------|
| MEETING DATE | 3/28/08                        |
| AGENDA ITEM  | B.5.<br>Employee Contributions |

### OVERVIEW

- Action: Adopt modifications to Employee Contributions for Prior Periods rule.
- Reason: Address employer concerns about invoicing for employee contributions.
- Subject: Employee Contributions for Prior Periods.
- Policy Issue: Whether PERS should accept responsibility to pay for earnings associated with a prior period contribution and, if so, under what circumstances?

### BACKGROUND

Employers raised several issues in the rulemaking on OAR 459-001-0030 to -0040 on reviews of appeals and contested cases. Some of those issues were particular to the process of invoicing employers for contributions in prior calendar years and for the earnings associated with those contributions. Staff indicated that those issues were better addressed in the rule related to the invoicing for those contributions, so we began this rulemaking accordingly.

Prior period contributions can be owed for a number of reasons, such as determining that employment was in a qualifying position or that the employer inadvertently failed to make contributions. These circumstances are most often discovered when an employee's records are audited at the time of a benefit payment (retirement allowance or withdrawal). Previous practice had been for PERS to invoice the employer for all contributions and the earnings those contributions would have accrued had they been received when originally due.

**POLICY ISSUE:** *Whether PERS should accept responsibility to pay for earnings associated with a prior period contribution and, if so, under what circumstances?*

As described above, the current practice is to invoice the employer for all the earnings that a prior period contribution would have earned had it been paid in the prior period. Employers have identified several instances where PERS knew or should have known that the contributions were owed long before the time the employer is issued an invoice. This delay increases the amount of earnings owed. Employers contend that PERS should be responsible for those earnings caused by its delay. The proposed rule modifications impose an obligation on PERS to pay for earnings associated with any periods which occur after PERS has returned or failed to accept the contributions in question from the employer.

The proposed rule modifications also designate that any earnings PERS pays would be charged against the earnings available for distribution in the year PERS actually posts those earnings to the member's account. In other words, if PERS credits a member's account in 2008 for earnings related to a prior period contribution, PERS will charge those earnings against the earnings otherwise available to distribute in 2008.

#### PUBLIC COMMENT AND HEARING TESTIMONY

A hearing was held on October 18, 2007 in Salem and another on October 23, 2007, at 2:00 p.m. at PERS headquarters in Tigard. Based on feedback from stakeholders, PERS reopened the public comment period and scheduled a second rulemaking hearing for January 22, 2008, at 2:00 p.m. at PERS headquarters in Tigard. No one attended. The second public comment period ended on February 22, 2008, at 5:00 p.m.

Lori Sattenspiel, representing the Oregon School Boards Association, submitted a public comment memo dated January 22, 2008 on behalf of the Employers PERS Alliance, which is attached. In response, notice will be sent to the address of record for both the employer and the affected member. Contributions are due as stated in the invoice to the employer. PERS will make a good faith effort to apportion earnings under this standard and, if an employer disagrees with that apportionment, they may seek a review of that determination.

Linda Ely also submitted comments dated February 22, 2008, a copy of which is attached. In response, the eligibility standard defers to the employer's intent as to whether the employee was in a qualifying position unless objective evidence (i.e., proof that the employee worked more than 600 hours in a calendar year) contradicts that intent. The standard for recovering prior period earnings is stated in the rule and is one PERS believes it can administer. If employers want to request a review of these matters, they may do so under the provisions of OAR 459-001-0032 if the PERS Board adopts that rule as recommended.

#### LEGAL REVIEW

The attached rule was submitted to the Department of Justice for legal review and any comments or changes are incorporated in the rule as presented for adoption.

#### IMPACT

**Mandatory:** No, the Board need not adopt the rule. The modifications were originally proposed at the request of the Employers PERS Alliance.

**Impact:** These modifications would have a minimal impact on processing these determinations and on the associated notifications that result from that review.

**Cost:** PERS would incur additional costs if it accepted responsibility for some of the associated earnings. These costs would reduce the earnings available for distribution, predominantly impacting employers, members, and the BIF. Over all, however, the amount of earnings PERS pays would not significantly reduce the earnings otherwise available for crediting.



### RULEMAKING TIMELINE

|                    |  |
|--------------------|--|
| August 15, 2007    | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State. |
| September 1, 2007  | <i>Oregon Bulletin</i> published the Notice.   |
| September 21, 2007 | PERS Board notified that staff began the rulemaking process.                                   |
| October 19, 2007   | Staff postponed First Reading of the rule to November 16, 2007, meeting.                       |
| October 23, 2007   | Rulemaking hearing to be held at 2:00 p.m. in Tigard.  |
| October 26, 2007   | Public comment period ended at 5:00 p.m.   |
| November 16, 2007  | Staff postponed First Reading of the rule to February 15, 2008, meeting.                       |
| December 15, 2007  | Rule Re-noticed to Secretary of State.   |
| January 22, 2008   | Rulemaking hearing held at 2:00 p.m. in Tigard.  |
| February 15, 2008  | First Reading of the rule.   |
| February 22, 2008  | Second public comment period ended at 5:00 p.m.  |
| March 28, 2008     | Board may adopt the rule modifications.  |

### BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt rule modifications to OAR 459-001-0030, OAR 459-001-0035 and OAR 459-001-0040, as presented.”
2. Direct staff to make other changes to the rules or explore other options.

### STAFF RECOMMENDATION

Staff recommends the Board choose option #1.

- Reason: Address employer concerns about invoicing for employee contributions.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 009 – PUBLIC EMPLOYER

1 **459-009-0130**

2 ***[Invoicing for Delinquent]* Employee Contributions for Prior Periods**

3 (1) When *[required to invoice for]* employee contributions*[, or employer "pick-up"*  
4 *of employee contributions,]* (ORS 238.205)*[,]* **are determined by PERS to be required**  
5 **for [on wages] salary** paid in previous calendar years, or allocated to such years pursuant  
6 to ORS 238.005~~[(11)]~~**(21)(b)(C) or ORS 238A.005(16)(b)(E),[:]** **PERS must notify**  
7 **both the employee and the employer of the amount of contributions required, the**  
8 **pay period and salary for which the contributions are to be paid, and the**  
9 **information relied upon by PERS in determining that the contributions are due.**  
10 **The employer must forward the required contributions to PERS.**

11 *[For Tier One members, an amount equal to the earnings actually distributed for*  
12 *Tier One members for those years shall be added to the Tier One member's individual*  
13 *account and the amount charged to the employer.]*

14 *[(2) For Tier Two members, an amount equal to the amount actually distributed for*  
15 *Tier Two members for those years shall be added to the Tier Two member's individual*  
16 *account and charged to the employer.]*

17 *[(3) For both Tier One and Tier Two members participating in the Variable Annuity,*  
18 *an amount equal to the amount actually distributed to members participating in the*  
19 *Variable Annuity for those years shall be added to the member's account in the Variable*  
20 *Annuity account in the Fund and charged to the employer.]*

1        (2) The notice provided under section (1) will also include a determination of  
2 the amount of earnings owed on the contributions, the amount of earnings the  
3 employer must pay, and the amount of earnings PERS will pay.

4        (a) In determining the amount of earnings the employer must pay, PERS will  
5 not include earnings attributable to periods after the date the employer submitted  
6 the contributions if:

7        (A) The employer submitted the contributions before PERS sent the notice that  
8 they were owed, and

9        (B) PERS returned or failed to accept the contributions.

10       (b) Any earnings paid by PERS will be charged to current year earnings in the  
11 year that the earnings are actually credited to the employee's account.

12       Stat. Auth: ORS 238.650

13       Stats. Implemented: ORS 238.200 and 238.705



# Oregon

Theodore R. Kulongoski, Governor

## Department of Administrative Services

Human Resource Services Division

HR Systems, Services, and Audits

155 Cottage Street NE, U30

Salem, OR 97301-3967

Phone: (503) 378-3041

FAX: (503) 378-5734

February 22, 2008

PERS Board  
Public Employees Retirement System  
PO Box 23700  
Tigard, OR 97281

Re: Public Comment on Rulemaking for  
OAR 459-009-0130 – Employee Contributions for Prior Periods

Dear Board Members:

The purpose of this letter is to provide comment on the amendments to this Administrative Rule.

We have concerns about who will be responsible for paying the earnings on some prior year invoices on eligibility studies that may be a number of years old. For example, when the employer used a different eligibility determination process, based on PERS' direction and found that contributions were not due at that time. PERS staff is currently reviewing many retiree accounts due to the *Strunk and Eugene* lawsuit. Along with the number of backlogged eligibility inquiries on the Member Eligibility Tracking System (METS) that still need to be reviewed and resolved, PERS staff may find when using the new eligibility determination methodology contributions might now be due in many of these cases.

These are our suggested changes:

- If employers determined eligibility correctly in the past, and now because of an inquiry, old or new, PERS staff revisits past years and finds a different result, employers should not have to pay for many years of earnings on contributions now due because of a change in how eligibility is now being determined. We believe that PERS should cover these earnings as an administrative expense.
- As we move forward, we would also like to see a limit on the number of years that PERS can seek to recover past earnings from employers in the case where the employer did everything correctly at the time (such as in the case of the inquiries that are currently on METS). Some of these are many years old and employers have been waiting years to get resolution on some of these inquiries. The employer should not have to pay earnings on an inquiry that they submitted to PERS over five years ago where nothing has yet been done on the case.
- Another avenue that might be considered is to have the ability for an employer to specifically appeal an invoice in earnings written into the rule. We understand that there is an appeal process under consideration by the Board in *OAR 459-001-0030 – Review of Staff Actions and Determinations*. However, the rule does not address this issue specifically and we would like to have a process clearly defined in the rule to support such an action.

We appreciate the opportunity to share our ideas and concerns.

Sincerely,

Linda Ely  
Retirement Analyst/Employer Representative  
Central PERS Services Team



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## REVIEW OF PERS RULES UP FOR PUBLIC HEARING - JANUARY 22, 2008

### 459-009-0130 – Employee Contributions for Prior Periods

Page 1, line 7 – states that PERS would contact both the employee and employer of the amount of contributions required, but does not address former employees? How will PERS contact them or is the employer responsible for doing so? Does this rule apply to former members, that is not clear. What if a former member becomes a member again, i.e. redeposits, exceeds 1039, etc. will past contributions be due? How will earnings be determined? The rule does not address this.

Page 1, line 10 – states employer must forward the required contributions to PERS. In many cases, contributions for the prior periods are not employer-paid contributions (EPPT), they are member paid, either MPPT or MPAT. I am assuming that the employer is responsible for obtaining those from the former employee, but the rule is not clear on that point.

\*\* Considerations for employers: if the prior contributions were MPPT or MPAT, the employer appears to be responsible for obtaining these contributions, or paying them. The tax implications should be considered. What if the former employee is deceased? These are the same concerns that were raised by employers when the definition of salary changed for the IAP, retroactively defining salary to how salary is defined under ORS 238.

Page 1, line 20 – states that the employer must forward the contributions, but does not state when. The rules does not state how long after notification the contributions are due.

Page 2, line 7 – states that the employer will not be responsible for earnings attributable to periods after the date the employer submitted contributions if the employer “submitted the contributions before PERS sent the notice.” The rule does not address whether the employer is off the hook only if they send the exact amount of the contributions or if any amount if sufficient. Additionally, the rule does not state whether the employer must also remit any earnings attributed to the time prior to the time PERS sends the notice. In other words, must the employer submit those in order to be off the hook for earnings attributable to periods after the date the employer submitted contributions? The rule is not clear.

General issues – PERS has a backlog of eligibility determinations. Additionally, PERS often does not know if an employee is due or owes past contributions until the time benefits are being requested, which can be many years after-the-fact. In many cases, employers sent in information that was never reconciled with PERS records. This proposed rule change appears to address the period of time only after PERS makes an eligibility determination, thereby determining that contributions for prior periods are due. It then requires an employer to be responsible not only for those past contributions, but also any earnings prior to the time the employer sends in some unknown amount or until PERS sends notice to the employer. This is not addressed by the rule.

Lori Sattenspiel  
Legislative and Public Affairs Specialist





# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator, PPLAD  
SUBJECT: Adoption of OAR 459-015-0055, *Selection of Benefit Option and Commencement of Allowance*

|              |   |
|--------------|---|
| MEETING DATE | <b>03/28/2008</b>                             |
| AGENDA ITEM  | <b>B.6.<br/>Disability<br/>Benefit Option</b> |

### OVERVIEW

- Action: Adopt modifications to Selection of Benefit Option and Commencement of Allowance rule for disability retirements.
- Reason: The current rule needs to be amended to clarify the administration of purchases of additional creditable service and retirement credit by members approved for disability retirement, and their beneficiaries.
- Subject: Purchase of creditable service or retirement credit incident to disability retirement under the PERS Chapter 238 Program.
- Policy Issue: No policy issues have been identified at this time.

### BACKGROUND

PERS Chapter 238 Program members who have been approved for disability retirement are allowed to make purchases of additional creditable service or retirement credit. The modifications to OAR 459-015-0055 clarify when that purchase must be made. The rule modifications also provide direction about the conditions under which the beneficiary of a deceased member may make the purchase when the member dies prior to PERS approving the disability retirement application.

When a member applies for a disability retirement benefit, they are asked to complete a preliminary benefit option selection form. This form documents the member's benefit option selection in case the member dies before PERS approves the disability retirement application.

In that case, the preliminary benefit option selection becomes effective when PERS approves the disability retirement application. The beneficiary, if any, named in the preliminary election may make purchases of additional creditable service and retirement credit to which the member was entitled within 90 days from the date the disability retirement application is approved.

If the deceased member did not complete a preliminary option selection form and the beneficiary designated to receive pre-retirement death benefits under ORS 238.390(1) is the member's surviving spouse, the rule provides for the surviving spouse to choose Option 2 or 3 and to purchase creditable service or retirement credit on behalf of the member, or to receive pre-retirement death benefits.

The proposed modifications more clearly describe current practice.

### PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing was held on January 22, 2008, at 2:00 p.m. at PERS Headquarters in Tigard. No one attended. The public comment period ended on February 22, 2008, at 5:00 p.m. No public comment was received.

### LEGAL REVIEW

The attached rule was submitted to the Department of Justice for legal review and any comments or changes are incorporated in the rule as presented for adoption.

### IMPACT

Mandatory: No, the Board could retain the existing rule language, but the current rule is unclear.

Impact: Members, beneficiaries, and staff will benefit from the rule's clarification.

Cost: There are no discrete costs attributable to this rule.

### RULEMAKING TIMELINE

|                   |  |
|-------------------|--|
| December 15, 2007 | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State. |
| January 1, 2008   | <i>Oregon Bulletin</i> published the Notice.   |
| January 22, 2008  | Rulemaking hearing scheduled at 2:00 p.m. in Tigard.   |
| February 15, 2008 | PERS Board notified that staff began the rulemaking process.                                   |
| February 22, 2008 | Public comment period ended at 5:00 p.m.   |
| March 28, 2008    | Board may adopt the rule modifications.  |

### BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt rule modifications to OAR 459-015-0055, as presented.”
2. Direct staff to make other changes to the rule or explore other options.

### STAFF RECOMMENDATION

Staff recommends the Board choose option #1.

- Reason: The current rule needs to be amended to clarify the administration of purchases of additional creditable service and retirement credit by members approved for disability retirement, and their beneficiaries.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board's policy direction if the Board determines that a change is warranted.



**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459**

**DIVISION 015 – DISABILITY RETIREMENT ALLOWANCES**

1 **459-015-0055**

2 **Selection of Benefit Option and Commencement of Allowance**

3 (1) Upon filing an application for a disability retirement allowance, the member may  
4 make a preliminary designation of beneficiary and a preliminary selection of benefit option.

5 (a) A member may choose from retirement Options 1, 2, 2A, 3, 3A, 15 year certain or  
6 refund annuity as set forth in ORS 238.300 and 238.305, or an optional disability retirement  
7 allowance under ORS 238.325.

8 (b) A member may not choose a lump-sum option.

9 (2) Within 90 days following the Director's, or the Director's designee's, approval of the  
10 application for disability retirement allowance, the member must complete a final designation  
11 of beneficiary and selection of benefit option on forms provided by PERS. Receipt of the final  
12 forms will supercede any preliminary beneficiary designation or benefit option.

13 (a) The final option selected applies only to the corresponding time period the member is  
14 receiving a disability retirement allowance.

15 (b) The beneficiary designation or benefit option may be changed up to 60 days after the  
16 date of the first benefit payment as provided in ORS 238.325(2).

17 (c) If a member's disability retirement allowance is canceled, the option selected for the  
18 purposes of that disability retirement allowance is canceled and a new option may be selected  
19 upon a subsequent disability or a service retirement.

20 (3) If the member does not complete a final selection of benefit option within 90 days  
21 following the Director's, or the Director's designee's, approval of the application for disability  
22 retirement allowance:

1 (a) The benefit will be the benefit as set forth under ORS 238.320(1); and

2 (b) The latest beneficiary designation on file for the PERS Chapter 238 Program will be  
3 used to determine the default beneficiary. If no designation exists, the beneficiary will be as  
4 provided for under ORS 238.390(2).

5 (4) Purchases. If a member is eligible to purchase additional creditable service or  
6 retirement credit under ORS [c]Chapter 238, the member must submit [the] payment for the  
7 purchase(s) *[shall accompany]* at the time the member submits the final selection of benefit  
8 option form required under Section (2) of this rule.

9 (5) The payment of a disability retirement allowance shall commence within ten days  
10 following receipt by PERS of all of the following items, or the date the first payment is due, as  
11 set forth in Section (6) of this rule, whichever is later:

12 (a) From the member:

13 (A) Final designation of beneficiary and selection of benefit option form;

14 (B) Proof of member's age;

15 (C) Proof of age for the designated beneficiary if a joint survivor option is elected; and

16 (D) Spousal consent form.

17 (b) From the employer:

18 (A) Financial; and

19 (B) Demographic information indicating the member has separated from PERS-covered  
20 employment.

21 (6) A disability payment is first due on the later of:

22 (a) The first of the calendar month in which the member files a complete application for  
23 disability benefits with PERS; or

1            (b) The first of the month following the first full calendar month after final payment by  
2 the employer of any wages or paid leave benefits to the member, excluding any cash payoff of  
3 accrued vacation or compensatory time; or

4            (c) The first of the calendar month following the date that the disability application is  
5 approved by the Director.

6            (d) Notwithstanding subsections (a), (b) and (c) of this section, no payment shall be made  
7 prior to the end of the period of 90 consecutive days beginning with the date of disability as  
8 defined in OAR 459-015-0001(4); and

9            (e) A disability retirement allowance shall be retroactive to the effective date of disability.

10           (7) If PERS cannot calculate the actual disability benefit payment, an estimated payment  
11 will be made until PERS receives all the necessary information needed to calculate the actual  
12 benefit payment. The payment will be made retroactive to the effective date of disability if the  
13 benefits become due before the 90 consecutive day period of incapacitation has elapsed.

14           (a) If the estimated payment results in an underpayment of \$10 or more a month, the  
15 member will receive interest based on the provisions set forth in OAR 459-007-0015.

16           (b) If the estimated payment results in an overpayment of any amount, the overpayments  
17 may be recovered by decreasing the monthly benefit amount until the difference between the  
18 amount the member received and the amount the member should have received is recovered.

19           (8) Within the 60 day period following the issue date of the first actual (not estimated)  
20 benefit payment, the member may change their benefit option. The Option change will be  
21 retroactive to the effective disability retirement date.

1 (9) Minimum disability benefit. A disability benefit will not be less than \$100 per month  
2 under the non-refund Option 1 benefit or the amount the member would have received for  
3 service retirement, if eligible, whichever is higher.

4 (10) In the event a member applying for a disability retirement allowance dies prior to the  
5 Director's approval of the application[, and]:

6 (a) **If** the member has made a preliminary [*designation of beneficiary or selected a*]  
7 benefit option **election**, the preliminary election[*(s)*] shall be effective upon the Director's  
8 approval of [*that*] **the** application **for disability retirement**.

9 **(A) If the deceased member was eligible to purchase additional creditable service or**  
10 **retirement credit under ORS Chapter 238, the beneficiary, if any, designated in the**  
11 **preliminary election may make the purchase(s) by submitting the required forms and**  
12 **payment within 90 days from the date the disability application is approved.**

13 [*(A) If the beneficiary is the surviving spouse, the surviving spouse may, within 90 days*  
14 *from the date the disability application is approved, elect to have either Option 2 or 3*  
15 *disability benefits or pre-retirement death benefits, as provided in ORS 238.390 or 238.395, if*  
16 *eligible.*

17 [*(B) If the surviving spouse elects either Option 2 or 3, the surviving spouse cannot name*  
18 *a beneficiary and all benefits will cease upon the spouse's death.]*

19 (b) **If** the member has not made a preliminary [*designation of beneficiary or selected a*]  
20 benefit option **election**, the member will be considered as having died before retirement.

21 **(A) If the beneficiary designated under ORS 238.390(1) is the surviving spouse, the**  
22 **surviving spouse may, within 90 days from the date the disability application is**

1 approved, elect to have either Option 2 or 3 disability benefits or pre-retirement death  
2 benefits, as provided in ORS 238.390 or 238.395, if eligible.

3 (i) Regardless of the election made by the surviving spouse under paragraph (b)(A)  
4 of this Section, all benefits will cease upon the surviving spouse's death.

5 (ii) If the deceased member was eligible to purchase additional creditable service or  
6 retirement credit under ORS Chapter 238, a surviving spouse who elects disability  
7 benefits under paragraph (b)(A) of this section, may make the purchase(s) by submitting  
8 the required forms and payment at the time of the election.

9 (B) If the beneficiary designated under ORS 238.390(1) is not the surviving spouse,  
10 the beneficiary will receive pre-retirement death benefits as provided in ORS 238.390 or  
11 238.395, if eligible.

12 Stat. Auth.: ORS 238.650

13 Stats. Implemented: ORS 238.320, 238.325 & 238.330<sup>[5]</sup>



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
SUBJECT: Adoption of OAR 459-050-0040, *Unforeseeable  
Emergency Withdrawal Appeals Committee*

|                 |                                       |
|-----------------|---------------------------------------|
| MEETING<br>DATE | <b>3/28/2008</b>                      |
| AGENDA<br>ITEM  | <b>B.7.<br/>Appeals<br/>Committee</b> |

### OVERVIEW

- Action: Adopt modifications to OSGP Unforeseeable Emergency Withdrawal Appeals Committee rule.
- Reason: Minor modification to allow the Oregon Savings Growth Plan (OSGP) Emergency Withdrawal Appeals Committee to meet sooner than currently allowed and to meet by phone or in person.
- Subject: OSGP Emergency Withdrawal Appeals Committee timeline and procedures.
- Policy Issues:
  1. How soon should the Emergency Withdrawal Appeals Committee meet upon receipt by the OSGP Manager of an appeal?
  2. In what manner should the Appeals Committee meet?

### BACKGROUND

Participants in OSGP may receive an emergency withdrawal from their OSGP account without separating from the sponsoring employer if they meet certain criteria. If the participant's request for an emergency withdrawal is denied, they may appeal the denial to the Emergency Withdrawal Appeals Committee. Currently, the rule requires the committee to wait until 14 days after the manager receives the appeal to meet and is silent on the manner of how the committee may meet.

### POLICY ISSUES

#### *1. How soon should the Appeals Committee meet upon receipt by the Manager of an appeal?*

One of the criteria that a participant must meet to obtain an emergency withdrawal is that there is an "immediate need" that the participant cannot satisfy through other means. The participant is now also required to apply for a plan loan, if eligible, prior to requesting an emergency withdrawal. By the time the participant appeals the denial of an emergency withdrawal request, they may be weeks into the process. Currently, the rule does not allow the Appeals Committee to meet until 14 days after the appeal is received. It would seem illogical in an "immediate need" situation to make the participant wait another two weeks for the Appeals Committee to meet when they are already weeks into the process. Making the committee (and the participant) wait

two weeks could perpetuate the hardship for the participant. OSGP staff are requesting the rule modification to remove the mandate for a 14 day delay.

2. *In what manner should the Appeals Committee meet?*

Currently the rule is silent on how the committee should meet. To facilitate a prompt meeting and decision, the OSGP staff recommend modifying the rule to allow the committee to meet via phone or in person.

PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing was held on January 22, 2008. No one attended. The public comment period ended on March 21, 2008 at 5:00 p.m. One comment was received.

Lori Sattenspiel from the OSBA, representing the Employers PERS Alliance, submitted comments in a memo dated January 22, 2008, which is attached. She expressed concern that the committee corresponding by email is no longer acceptable. This is not the intention of the change. The committee will still be able to communicate by email, but must meet in person or by phone to make a decision.

The letter included several suggested minor edits for consistency. Staff reviewed the recommendations and made changes where appropriate.

LEGAL REVIEW

The attached rule was submitted to the Department of Justice for legal review. Any comments or changes are incorporated in the rule as presented for adoption.

IMPACT

Mandatory: No.

Impact: Appeals will be processed in a timely manner and the committee will meet in person or by phone.

Cost: There are no discrete costs attributable to the rule.

RULEMAKING TIMELINE

|                   |  |
|-------------------|--|
| December 15, 2007 | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State. |
| January 1, 2008   | <i>Oregon Bulletin</i> published the Notice.   |
| January 22, 2008  | Rulemaking hearing held at 2:00 p.m. in Tigard.  |
| February 15, 2008 | PERS Board notified that staff began the rulemaking process.                                   |
| March 21, 2008    | Public comment ended at 5:00 p.m.  |
| March 28, 2008    | Board may adopt the rule modifications.  |

### BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt modifications to OAR 459-050-0040, Unforeseeable Emergency Withdrawal Appeals Committee, as presented.”
2. Direct staff to make other changes to the rules or explore other options.

### STAFF RECOMMENDATIONS

Staff recommends the Board choose Option #1.

- Reason: Minor modification to allow the Oregon Savings Growth Plan (OSGP) Emergency Withdrawal Appeals Committee to meet sooner than currently allowed and to meet by phone or in person.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

B.7. Attachment 1 – OAR 459-050-0040, Unforeseeable Emergency Withdrawal Appeals Committee

B.7. Attachment 2 – Sattenspiel memo dated January 22, 2008



**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 050 – DEFERRED COMPENSATION**

1 **459-050-0040**

2 **Unforeseeable Emergency Withdrawal Appeals Committee**

3 (1) Purpose. The Unforeseeable Emergency Withdrawal Appeals Committee (the  
4 Committee) shall evaluate appeals denied by the Deferred Compensation Manager or  
5 designee authorized to take action on the Manager's behalf for the distribution of deferred  
6 compensation on the basis of claims of unforeseeable emergency in compliance with the  
7 Internal Revenue Code, Section 457, 26 USC 457, and the provisions of OAR 459-050-  
8 0150. The Committee shall formally approve or deny each appeal based on the merits of  
9 the appeal. *[and the standards set forth in applicable U.S. Treasury Regulations.]*

10 (2) Committee composition. The Committee shall consist of not fewer than three  
11 persons.

12 (a) One person shall be a PERS staff member from the Deferred Compensation  
13 Program.

14 (b) Two persons shall be PERS staff members from other than the Deferred  
15 Compensation Program.

16 (3) Committee meetings. The Committee shall meet upon the call of the Manager of  
17 the Deferred Compensation Program no later than *[no sooner than]* 14 calendar days  
18 following receipt of an appeal. The Committee may meet by phone or in person. The  
19 Committee shall evaluate the participant's written request, emergency withdrawal  
20 application, financial information, and all related documentation submitted for  
21 compliance with 26 USC 457 and the provisions of OAR 459-050-0150. *[The*  
22 *Committee may address appeals by phone, email, or in person.]*

1 (4) Appeal approval. If an appeal is approved, the Committee authorizes the  
2 Manager to release the funds within 30 calendar days of approval.

3 (5) Appeal denial. Within seven calendar days of the Committee's denial, the  
4 requestor may request an informal conference with the Deferred Compensation Manager  
5 or designee authorized to take action on the Manager's behalf.

6 (6) Request for review. The requester may submit a request for review of the  
7 Committee's determination to the Director of PERS and *[shall]*must do so within 30  
8 calendar days of the Committee's denial. The request *[shall]*must be in writing and  
9 include:

10 (a) A description of the staff action or determination for which review is requested;

11 (b) A short statement of the manner in which the action is alleged to be in error;

12 (c) A statement of facts that are the basis of the request;

13 (d) Reference to applicable statutes, rules or court decisions upon which the person  
14 relies;

15 (e) A statement of the relief the request seeks; and

16 (f) A request for review.

17 (7) Director's determination. Within 30 calendar days of receiving a request for  
18 review, the Director shall issue a written determination either approving or denying the  
19 unforeseeable emergency withdrawal.

20 Stat. Auth: ORS 243.470

21 Stats. Implemented: ORS 243.401 – 243.507



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**REVIEW OF PERS RULES UP FOR PUBLIC HEARING - JANUARY 22,  
2008**

**459-050-0040 – Unforeseeable Emergency Withdrawal Appeals Committee**

Page 1, line 19 – limits the Committee to meeting via phone or in person. I am assuming that corresponding by email is no longer acceptable. Having been on the Committee, we always corresponded and discussed the appeals via email. Why the change?

Page 2, line 7 – “shall” should be changed to “must” to be consistent with the rest of OAR 459.

Page 2, line 8 - “shall” should be changed to “must” to be consistent with the rest of OAR 459.

Page 2, line 11 – insert “the” before “basis” to be consistent with 459-001-0030(4).

Page 2, line 17 - “shall” should be changed to “must” to be consistent with the rest of OAR 459.

Lori Sattenspiel  
Legislative and Public Affairs Specialist  
Oregon School Boards Association



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator, PPLAD  
SUBJECT: Temporary Adoption and Notice of Permanent Rulemaking  
for Creditable Service and Retroactive Salary Payments  
Rules:  
OAR 459-010-0014, *Creditable Service in the PERS Chapter 238 Program*  
OAR 459-010-0042, *Retroactive Salary Payments*

|                 |                             |
|-----------------|-----------------------------|
| MEETING<br>DATE | <b>03/28/08</b>             |
| AGENDA<br>ITEM  | <b>B.8.<br/>Cr. Service</b> |

### OVERVIEW

- Action: Adopt temporary modifications to the Creditable Service and Retroactive Salary Payments rules.
- Reason for Temporary Rules: The rule would provide creditable service to an employee who receives a retroactive payment of wages incident to resolving an employment dispute. This issue needs to be addressed so ongoing employment matters can be resolved and the parties can understand the PERS impact of those resolutions.
- Subject: Creditable service and retroactive salary payments in the PERS Chapter 238 Program.
- Policy Issue: Should an employee who receives a retroactive payment of wages receive creditable service for the time associated with that retroactive payment award?

### BACKGROUND

PERS regularly receives court orders, administrative orders, settlement agreements, and other documents representing the resolution of a dispute between an employer and employee. Often, the resolution results in payment of back wages for a period the employee was absent from employment. Generally, the order or agreement directs that the employee be “made whole,” including in regards to the PERS benefits the employee would have accrued.

ORS 238.005(21)(b)(C) includes these back wages as “salary” and provides specific authority to attribute them to the period they would have been earned. No statute contains a similar parallel for creditable service during that same period. Before 2003, “creditable service” was awarded for periods that members made contributions. Retroactive salary payments triggered contributions, which resulted in creditable service. When the 2003 PERS Reform legislation re-routed contributions from the member’s Regular Account to the IAP, the “creditable service” standard changed from contributions to present employment. These rule modifications clarify that this statutory change does still allow for creditable service during the period of absence under the specified circumstances.

## POLICY ISSUE AND SUMMARY OF PROPOSED RULE MODIFICATIONS

*Should an employee who receives a retroactive payment of wages receive creditable service for the time associated with that retroactive payment award?*

The resolution that the employee be “made whole” indicates intent to restore the employee to the status they would be in if the absence had not occurred, including PERS contributions and creditable service. Without the award of creditable service for the period, PERS cannot completely restore that status, leaving the parties to craft another solution outside of the retirement system that compensates the employee for their lost creditable service. Crafting that solution could be very difficult, trying to account for the costs of delayed retirement eligibility, potentially lower benefit payments, etc.

The proposed rule modifications allow for creditable service in limited circumstances consistent with the current statutory structure. More specifically:

OAR 459-010-0014: This rule provides standards used to determine the accrual of creditable service in the PERS Chapter 238 Program. The rule was modified to reference the accrual of creditable service incident to a retroactive payment under OAR 459-010-0042(4).

OAR 459-010-0042: This rule outlines the administration of retroactive salary payments. The modifications to the rule clarify the definition of “retroactive payment” and provide standards for allocating such payments. The changes clarify that payments allocated to periods of non-membership may not be used to determine contributions or benefits. Also, a condition to receiving creditable service for periods to which retroactive payments are attributed is that the employee be an active member on the date of the retroactive payment. It also clarifies the time limit within which a member who receives a retroactive payment may restore rights forfeited by withdrawal during the period of absence. Lastly, the rule applies retroactively to July 31, 2003, the effective date of the statutory changes, to provide for consistency in the administration of retroactive payment and creditable service determinations.

## JUSTIFICATION FOR TEMPORARY RULEMAKING

Staff recommends temporary adoption of the rule modifications and the commencement of permanent rulemaking. Failure to temporarily adopt the rules will perpetuate PERS’ inability to implement the intent of the parties associated with a retroactive payment. Members and employers will continue to be frustrated by their inability to adequately resolve their disputes. Recipients of retroactive payments since 2003 may now be eligible to retire upon receipt of creditable service made available by the retroactive application of the rule. Delay in adoption would delay retirement eligibility for these members. If adoption is postponed, retroactive adjustments will be necessary for retroactive payments administered in the interim. The temporary adoption of the rules will provide PERS an authority and mechanism to avoid these consequences.

### PUBLIC COMMENT AND HEARING TESTIMONY

A rulemaking hearing was held on March 25, 2008 at 2:00 p.m. at PERS headquarters in Tigard. Any comments will be brought forth to the PERS Board at its March 28, 2008 meeting. A second public comment period incident to the permanent rulemaking is scheduled for April 22, 2008. The public comment period ends on April 30, 2008 at 5:00 p.m.

### LEGAL REVIEW

The attached rules have been submitted to the Department of Justice for legal review and any comments or changes are incorporated in the rules as presented for temporary adoption.

### EFFECTIVE DATE

These rule modifications will become effective upon filing. The maximum period they can remain in effect is 180 days, so staff will initiate permanent rulemaking to replace these temporary rules.

### IMPACT

Mandatory: No, the Board need not adopt the rules.

Impact: Employers, members, and staff will benefit from the rules' clarification of the standards used in these determinations. Administration of these resolutions will be closer to the parties' intentions.

Cost: There are no significant costs attributable to these rules.

### RULEMAKING TIMELINE

|                   |   |
|-------------------|---|
| February 15, 2008 | Staff began the rulemaking process by filing Notice of Rulemaking with the Secretary of State.  |
| March 1, 2008     | <i>Oregon Bulletin</i> published the Notice of Rulemaking Hearing.  |
| March 25, 2008    | Rulemaking hearing held at 2:00 p.m. in Tigard.   |
| March 28, 2008    | PERS Board may adopt the proposed temporary rules; PERS staff will proceed with permanent rulemaking unless otherwise directed.                         |
| April 1, 2008     | <i>Oregon Bulletin</i> publishes the Notice of Rulemaking Hearing.  |
| April 22, 2008    | Rulemaking hearing to be held at 2:00 p.m. in Tigard.   |
| April 30, 2008    | Public comment period ends.   |
| May 16, 2008      | Staff will propose adopting the permanent rule modifications, including any changes resulting from public comment or reviews by staff or legal counsel. |

### BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt the proposed temporary modifications to OAR 459-010-0014 and 459-010-0042.”
2. Direct staff to make other changes to the rules or explore other options.

### STAFF RECOMMENDATION

Staff recommends the Board choose Option #1.

- Reason: The rules clarify that an employee who successfully disputes an employer discharge or suspension, is reinstated, and receives a retroactive payment of wages for the period of absence can receive creditable service for the period associated with the retroactive payment. Also, provisions regarding retroactive payments made to terminated members are obsolete and in need of revision.

If the Board does not adopt: Staff would return with rule modifications that more closely fit the Board’s policy direction if the Board determines that a change is warranted.

B.8. Attachment 1 - OAR 459-010-0014, Creditable Service in the PERS Chapter 238 program

B.8. Attachment 2 - OAR 459-010-0042, Retroactive Salary Payments

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 010 – MEMBERSHIP**

1 **459-010-0014**

2 **Creditable Service in PERS Chapter 238 Program**

3 (1) For purposes of this rule:

4 (a) “Active member” has the same meaning as provided in ORS 238.005(12)(b).

5 (b) “Creditable service” has the same meaning as provided in ORS 238.005(5).

6 (c) “Major fraction of a month” means a minimum of 50 hours in any calendar  
7 month in which an active member is being paid a salary by a participating public  
8 employer and for which benefits under ORS Chapter 238 are funded by employer  
9 contributions.

10 (2) An active member accrues one month of creditable service for each month in  
11 which the member performs service for the major fraction of the month.

12 (3) An active member is presumed to have performed service for a major fraction of  
13 a month if:

14 (a) The member performs at least 600 hours of service in the calendar year and the  
15 member's employer(s) reports salary and hours for a pay period occurring within the  
16 calendar month;

17 (b) The member starts employment on or before the 15th day of the calendar month  
18 and the employment continues through the end of the month;

19 (c) The member starts employment on or before the first day of the calendar month  
20 and ends employment on or after the 16th day of the month; or



1 (d) The member starts employment on or before the first day of the calendar month  
2 and ends employment before the 16th day of the month, but is reemployed in a qualifying  
3 position before the end of the month.

4 (4) A member or employer may seek to rebut the determination of creditable service  
5 based on the presumptions in section (3) by providing to PERS records that establish that  
6 the member did or did not perform service for a major fraction of a month as defined in  
7 subsection (1)(c) of this rule.

8 (5) Sections (2) and (3) of this rule notwithstanding, an active member who is a  
9 school employee will accrue six months of creditable service if the member performs  
10 service for all portions of a school year that fall between January 1 and June 30, and six  
11 months of creditable service if the member performs service for all portions of a school  
12 year that fall between July 1 and December 31.

13 **(6) A member may accrue creditable service as provided in OAR 459-010-**  
14 **0042(3).**

15 ~~[(6)]~~ **(7)** A member may not accrue more than one month of creditable service for  
16 any calendar month and no more than one year of creditable service for any calendar  
17 year.

18 ~~[(7)]~~ **(8)** The provisions of this rule are effective for service credit determinations  
19 made on or after January 1, 2008.

20 Stat. Auth.: ORS 238.650

21 Stats. Implemented: ORS 238.005 & 238.300



# Oregon

Theodore R. Kulongoski, Governor

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March 28, 2008

TO: Members of the PERS Board  
FROM: Dale S. Orr, Coordinator, Actuarial Analysis Section  
SUBJECT: Final 2007 Earnings Crediting and Reserving

|              |                                |
|--------------|--------------------------------|
| MEETING DATE | <b>3/28/08</b>                 |
| AGENDA ITEM  | <b>C.1.<br/>Final Earnings</b> |

### EXECUTIVE SUMMARY

At its meeting on February 15, 2008, the Board approved the preliminary crediting of 2007 regular account earnings with the addition of \$357.4 million to the Contingency Reserve. The Board's action was reported to a legislative committee as required by ORS 238.670(5) (see attached report). The report was accepted by the Joint Ways and Means Committee on February 20, 2008 without comment.

The Board must now make its final 2007 crediting decision. The earnings amounts shown in this report may change slightly when the annuals process is completed in late March. Should the earnings amount change, a walk-in item will be provided at the March 28, 2008 meeting.

### BACKGROUND

The Board's February 15, 2008 decision directed that 2007 earnings be preliminarily credited as follows:

| <b>Reserve</b>                 | <b>Balance Before 2007 Crediting (millions)</b> | <b>Preliminary 2007 Crediting Amount (millions) or Rate</b> | <b>Preliminary Ending Reserve Balances (millions)</b> |
|--------------------------------|---|---|---|
| <b>Contingency</b>             | \$295.3   | \$357.4   | \$652.7   |
| <b>Tier One Rate Guarantee</b> | \$1,635.4                                       | \$253.9   | \$1,889.4   |
| <b>Tier One Accounts</b>       | \$6,845.0                                       | 8% gross<br>7.97% net                                       | \$7,391.2   |
| <b>Tier Two Accounts</b>       | \$728.7   | 9.45%   | \$797.6   |
| <b>Employer</b>                | \$15,777.3                                      | 9.45%   | \$17,269.0  |
| <b>Benefits In Force</b>       | \$22,375.1                                      | 9.45%   | \$24,490.7  |
| <b>OPSRP Pension</b>           | \$257.8   | 8.32%   | \$279.3   |

In making its preliminary 2007 earnings crediting decision, the Board directed that the maximum amount of earnings allowed by statute (7.5% of earnings) be placed in the Contingency Reserve. They took this action in order to protect against shortfalls arising from potential adverse decisions from ongoing litigation and to cover unforeseen future needs that, due to the current unsettled markets, may not be easily funded should future years' earnings fall below the assumed earnings rate.

The preliminary crediting decision and the resulting report to the Legislature do not prohibit the Board from changing its final crediting and reserving decisions if new information becomes available. If the Board makes a significant change from its preliminary decision, staff will promptly report the Board's actions to the Legislature.

### POLICY DISCUSSIONS

There are no new policy discussion topics since the Board made its preliminary decision. Here is a summary of the policy decisions considered by the Board at its February 15, 2008 meeting.

**Contingency Reserve:** The Board considered three options for placing additional dollars in the Contingency Reserve as follows:

Option 1: No increase. This would leave the Contingency Reserve at its current level of \$295.3 million.

Option 2: \$50 million increase. This would increase the size of the Contingency Reserve to \$345.3 million so that it stays at the same proportional level to the entire PERS Fund established by the Board at the end of 2006 (approximately 50 basis points).

Option 3: \$357.4 million increase. This represents crediting the full 7.5% of earnings, the maximum amount allowed by statute that can be placed in the Contingency Reserve from 2007 earnings. This would bring the reserve balance to \$652.7 million.

**Board Preliminary Action:** Board approved Option 3, increasing the Contingency Reserve by \$357.4 million.

**Strunk member's Attorney Fees:** The Oregon Supreme Court in the *Strunk* case awarded attorney fees to the member's attorneys on a common fund theory of recovery. Under that theory, the attorney fees are to be awarded from the fund created by their success on the issues where they prevailed in that case. One of those issues was the restoration of annually crediting at least the assumed rate (currently 8%) to Tier One member Regular Accounts.

As a result, the court has directed PERS to take the member's attorney fees from the 2007 earnings that would otherwise be credited to Tier One member Regular Accounts. As a result, fees in the amount of \$1,359,566 were deducted from these earnings, causing the preliminary crediting rate for Tier One member Regular Accounts to be reduced from 8.00% to a preliminary earnings crediting rate of 7.97%.

**Board Preliminary Action:** Credit Tier One member Regular Accounts with a preliminary 7.97% after deducting the *strunk* case member's attorney fees award described above.

**Tier One Rate Guarantee Reserve:** As required by statute, all preliminary 2007 Tier One member regular Account earnings in excess of eight percent were credited to Tier One Rate Guarantee Reserve increasing that reserve to \$1,889.4 million. Staff from Mercer, PERS actuary, stated that the Tier One Rate Guarantee Reserve still had not achieved the statutory required funded level under any of three probability thresholds being considered by the Board. The three probability thresholds are 99%, 95% and 90% chance that the Tier One Rate Guarantee Reserve will be at a zero account balance by the time the last Tier One member retires.

**Board Preliminary Action:** No action taken or required.

#### FINAL EARNINGS CREDITING STAFF RECOMMENDATION AND BOARD OPTIONS

The Board's final allocation of 2007 earnings would be based on the following assumptions and preliminary steps, as outlined in OAR 459-007-0005:

1. Credit the health insurance accounts in the PERS Fund with their actual earnings, less administrative expenses incurred.
2. Credit employer lump sum payment accounts with actual earnings, less administrative expenses as authorized by ORS 238.225(10).
3. Credit Variable Annuity Accounts with their actual earnings, less a proportional charge for administrative expenses. (Variable earnings for 2007 are currently estimated at 1.75%)
4. Credit Individual Account Program (IAP) ts and OPSRP reserves with actual earnings, less an allocated charge for those program's administrative expenses.
5. Net the agency's administrative expenses from available earnings, which are to be recovered first from available earnings according to ORS 238.610.

Staff recommends the following earnings allocations be adopted by the PERS Board:

*1. Funding of Contingency Reserve*

Credit 7.5% of 2007 earnings to the Contingency Reserve (Option 3).

*2. Judge Member Accounts*

Credit Judge Member accounts with the assumed earnings rate (8%).

*3. Tier One Member Regular Accounts*

Credit Tier One member Regular Accounts with 7.97%, after deducting the required amount to pay the *Strunk* case member's attorney fees as described above, and credit the remainder of Tier One member Regular Account earnings to the Tier One Rate Guarantee Reserve.

*4. Tier Two Member Regular Accounts, Benefits-In-Force and Employer Reserves*

Credit Tier Two member Regular Accounts, Benefits-In-Force Reserve and PERS Chapter 238 Employer Reserves evenly with the remaining available earnings attributable to those accounts and reserves.

## BOARD OPTIONS

The Board may:

1. Pass a motion to “adopt the staff’s recommended crediting and reserving allocations for calendar year 2007 earnings.”
2. Pass a motion to “adopt the staff’s recommended crediting and reserving allocations for calendar year 2007 earnings, but amend that recommendation as follows:
  - By crediting an amount less than 7.5% of 2007 earnings to the Contingency Reserve.

C.1. Attachment 1 – Legislative Earnings Crediting Report (February 15, 2008)

C.1. Attachment 2 – ORS 238.670 – Reserve Accounts

C.1. Attachment 3 – ORS 238.255 – Credits to Regular Accounts

C.1. Attachment 4 – OAR 459-007-0005 “Annual Earnings Crediting”

**OREGON ADMINISTRATIVE RULE  
PUBLIC EMPLOYEES RETIREMENT BOARD  
CHAPTER 459  
DIVISION 010 – MEMBERSHIP**

1 **459-010-0042**

2 **Retroactive Salary Payments**

3 (1) For the purpose of this rule, “retroactive payment” means a payment of  
4 salary attributable to a prior period made pursuant to a court order, administrative  
5 order, arbitration award, conciliation agreement, or private settlement agreement  
6 that resolves a dispute or claim based upon an employee’s rights under employment  
7 and wage law or a collective bargaining agreement.

8 (2) A retroactive payment must be allocated to the period(s) in which the work  
9 was done or would have been done and deemed paid as so allocated pursuant to  
10 ORS 238.005(21)(b)(C). Payments allocated to any period during which the  
11 employee was an active or inactive member must be used in the determination of  
12 employee and employer contributions and in the calculation of benefits. Payments  
13 allocated to any period of non-membership or retired membership must not be used  
14 to determine contributions or calculate benefits.

15 (3) Except as provided in OAR 459-010-0014(7), an employee who is an active  
16 member on the date of a retroactive payment will receive creditable service for  
17 those periods of active or inactive membership to which the payment is allocated.

18 (4) An employee who is terminated from employment, withdraws the member  
19 account under ORS 238.265, and is reinstated to employment in connection with a  
20 retroactive payment may restore membership and service rights as provided in  
21 OAR 459-011-0050 within the time period described in Section (2) of that rule or

1 within one year from the date the employee actually returns to employment,  
2 whichever is later.

3 (5) The provisions of this rule apply to retroactive payments made on or after  
4 July 31, 2003.

5 Stat. Auth.: ORS 238.650

6 Stats. Implemented: ORS 238.005, 238.105

7 *[(1) Retroactive payment of salary or wages due a member under the provisions of*  
8 *ORS 238.005(11)(b)(C) shall be allocated to the period(s) when the service was or would*  
9 *have been performed (when earned) for the purposes of determining employee and*  
10 *employer contributions and in computing benefits.*

11 *(2) For a Tier One member, a retroactive payment that is not made pursuant to ORS*  
12 *238.005(11)(b)(C) shall not be allocated to any prior period, but shall be treated as*  
13 *wages on the date when paid, and contributions shall be forwarded only if the member*  
14 *was an active member of PERS on the date of the payment.*

15 *(3) For a Tier Two member, a retroactive payment that is not made pursuant to ORS*  
16 *238.005(11)(b)(C):*

17 *(a) Shall be allocated to when earned for purposes of computing final average*  
18 *salary under ORS 238.435(2), exclusive of a lump sum payment for accrued vacation*  
19 *(ORS 238.435(1)); and*

20 *(b) Shall have contributions forwarded only if the member was an active member of*  
21 *PERS on the date of the payment.*

22 *(4) In the event a terminated member is successful in a claim for wrongful discharge*  
23 *and part of the settlement reinstates the terminated member to employment:*

1        *(a) A terminated member shall become an active member of PERS in accordance*  
2 *with ORS 238.015;*

3        *(b) A terminated member may elect to re-deposit the funds withdrawn as provided in*  
4 *ORS 238.105 or within one year of the date of the settlement, whichever is the later.*

5        *(5) If a terminated member elects to re-deposit as provided in section (4) of this rule*  
6 *prior to the six-month period in ORS 238.015, the terminated member shall become an*  
7 *active member of PERS of the first of the calendar month following the date of re-deposit.*

8        *(6) In the event a terminated member is successful in a claim for wrongful discharge*  
9 *and part of the settlement reinstates the member to employment retroactively to date of*  
10 *termination, the retroactive payment of wages shall be subject to both employee and*  
11 *employer contributions, regardless of whether the member received a refund or elects to*  
12 *re-deposit a refund. The retroactive payment of wages shall be allocated to and deemed*  
13 *paid in the period the work would have been done.*

14        *Stat. Auth.: ORS 238.005(11) & ORS 238.650*

15        *Stats. Implemented: ORS 238.055(11), ORS 238.055(15), ORS 238.200 – ORS*  
16 *238.230, ORS 238.300 & ORS 238.435]*





# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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February 15, 2008

Senator Kurt Schrader, Co-Chair  
Representative Mary Nolan, Co-Chair  
Joint Ways and Means Committee  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairs:

### **Nature of the Request:**

To report the PERS Board's preliminary decision to credit 2007 earnings received through investment of the Oregon Public Employees Retirement Fund (OPERF). This report is being provided in accordance with ORS 238.670(5), which requires PERS to submit a preliminary annual earnings crediting report to a legislative committee 30 days prior to final crediting to member and employer accounts and other reserves.

### **Agency Action:**

On February 15, 2008, the PERS Board preliminarily approved the crediting of approximately \$5.8 billion in 2007 earnings to member and employer accounts and other reserves. This decision, if finalized, would credit 9.45% to the Benefits-In-Force Reserve, Employer Reserves, and Tier Two member regular accounts. The Board also approved a preliminary 7.97% to be credited to Tier One Member Accounts. This percent is the statutorily guaranteed assumed earnings rate of 8% reduced by a court-ordered payment of attorney fees related to the *Strunk* case. All other Tier One member account earnings over the assumed earnings rate of 8% were preliminarily allocated to the Tier One Rate Guarantee Reserve. The Board chose to transfer a preliminary \$357.4 million to the Contingency Reserve which would increase that reserve from its current balance of \$295.3 million to \$652.7 million. This represents the maximum amount, allowed by statute, that can be transferred into the Contingency Reserve. A reserve summary of the Board's preliminary decision is provided in the attached document.

PERS staff will be available to report to the Legislature and answer questions regarding the Board's preliminary decisions on February 20, 2008.

The PERS Board is scheduled to make its final 2007 earnings crediting decision on March 28, 2008.

### **Action Requested:**

PERS is requesting that the Committee acknowledge receipt of the report.

### **Legislation Effected:**

2007 Preliminary Earnings Crediting

02-15-08

Page 2 of 2

No legislative revisions will be required.

Thank you for your interest and assistance.

Sincerely,

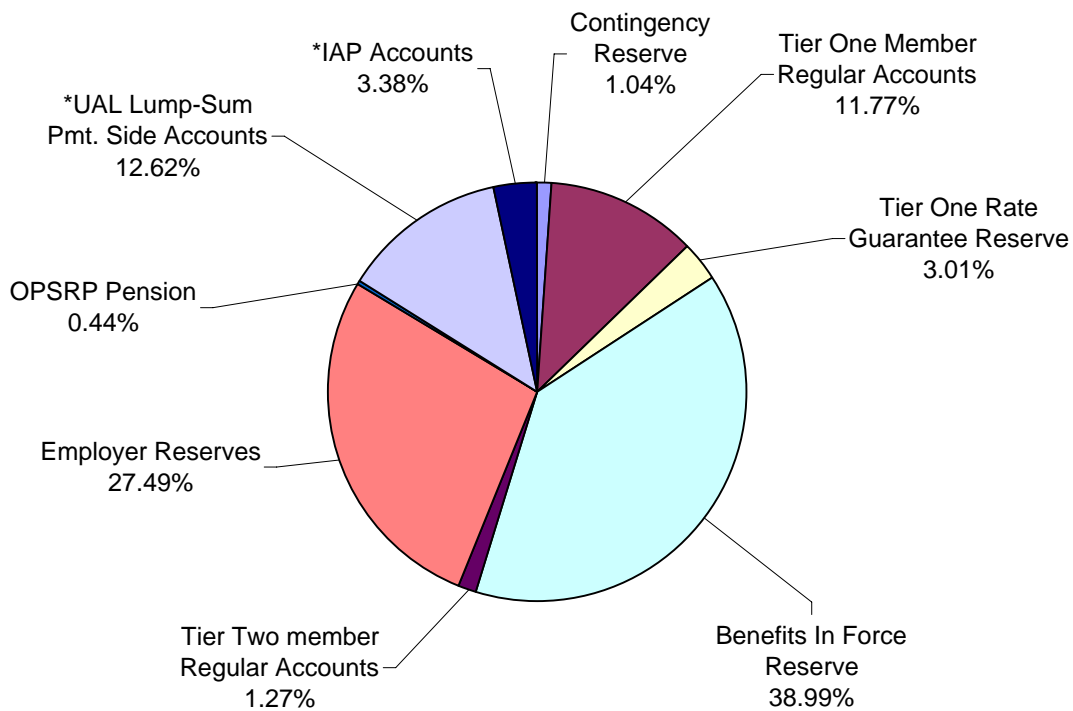
Paul R. Cleary  
Executive Director

Attachment - Option 3 2007 Preliminary Earnings Crediting

**Option 3**  
**2007 Preliminary Earnings Crediting**  
**\$357.4 Million (Maximum) Additional to Contingency Reserve**  
**(All dollar amounts in millions)**

| Regular Account Reserve          | Reserves Before Crediting | 2007 Preliminary Crediting | Reserves After Crediting | 2007 Preliminary Rates |
|----------------------------------|---------------------------|----------------------------|--------------------------|------------------------|
| Contingency Reserve              | \$295.3                   | \$357.4                    | \$652.7                  | N/A                    |
| Tier One Member Regular Accounts | 6,845.0                   | 546.2                      | 7,391.2                  | 7.97%                  |
| Tier One Rate Guarantee Reserve  | 1,635.4                   | 253.9                      | 1,889.4                  | N/A                    |
| Benefits In Force Reserve        | 22,375.1                  | 2,115.6                    | 24,490.7                 | 9.45%                  |
| Tier Two member Regular Accounts | 728.7                     | 68.9                       | 797.6                    | 9.45%                  |
| Employer Reserves                | 15,777.3                  | 1,491.8                    | 17,269.0                 | 9.45%                  |
| OPSRP Pension                    | 257.8                     | 21.5                       | 279.3                    | 8.32%                  |
| *UAL Lump-Sum Pmt. Side Accounts | 7,195.0                   | 731.1                      | 7,926.1                  | Various                |
| *IAP Accounts                    | 1,939.1                   | 184.1                      | 2,123.2                  | 9.49%                  |
| <b>Total</b>                     | <b>57,048.8</b>           | <b>\$5,770.5</b>           | <b>\$62,819.3</b>        |                        |

**2007 Regular Account Reserve Balances**  
**After 2007 Preliminary Crediting**



\*Informational only. Not effected by Board reserving or crediting decisions.

**ORS 238.670**  
**Reserve accounts in fund**

(1) At the close of each calendar year in which the earnings on the Public Employees Retirement Fund equal or exceed the assumed interest rate established by the Public Employees Retirement Board under ORS 238.255, the board shall set aside, out of interest and other income received through investment of the Public Employees Retirement Fund during that calendar year, such part of the income as the board may deem advisable, not exceeding seven and one-half percent of the combined total of such income, which moneys so segregated shall remain in the fund and constitute therein a reserve account. The board shall continue to credit the reserve account in the manner required by this subsection until the board determines that the reserve account is adequately funded for the purposes specified in this subsection. Such reserve account shall be maintained and used by the board to prevent any deficit of moneys available for the payment of retirement allowances, due to interest fluctuations, changes in mortality rate or, except as provided in subsection (3) or (4) of this section, other contingency. In addition, the reserve account may be used by the board for the following purposes:

(a) To prevent any deficit in the fund by reason of the insolvency of a participating public employer. Reserves under this paragraph may be funded only from the earnings on employer contributions made under ORS 238.225.

(b) To pay any legal expenses or judgments that do not arise in the ordinary course of adjudicating an individual member's benefits or an individual employer's liabilities.

(c) To provide for any other contingency that the board may determine to be appropriate.

(2) At the close of each calendar year, the board shall set aside, out of interest and other income received during the calendar year, after deducting the amounts provided by law and to the extent that such income is available, a sufficient amount to credit to the reserves for pension accounts and annuities varying percentage amounts adopted by the board as a result of periodic actuarial investigations. If total income available for distribution exceeds those percentages of the total accumulated contributions of employees and employers, the reserves for pensions and annuities shall participate in such excess.

(3) The board may set aside, out of interest and other income received through investment of the fund, such part of the income as the board considers necessary, which moneys so segregated shall remain in the fund and constitute one or more reserve accounts. Such reserve accounts shall be maintained and used by the board to offset gains and losses of invested capital. The board, from time to time, may cause to be transferred from the reserve account provided for in subsection (1) of this section to a reserve account provided for in this subsection such amount as the board determines to be unnecessary for the purposes set forth in subsection (1) of this section and to be necessary for the purposes set forth in this subsection.

(4) The board may provide for amortizing gains and losses of invested capital in such instances as the board determines that amortization is preferable to a reserve account provided for in subsection (3) of this section.

(5) At least 30 days before crediting any interest and other income received through investment of the Public Employees Retirement Fund to any reserve account in the fund, the board shall submit a preliminary proposal for crediting to the appropriate legislative review agency, as defined in ORS 291.371 (1), for its review and comment. [Formerly 237.281; 2001 c.945 §5]

**ORS 238.255****Credits to regular accounts when earnings less than assumed interest rate.**

(1) The regular account for members who established membership in the system before January 1, 1996, as described in ORS 238.430, and for alternate payees of those members, shall be examined each year. If the regular account is credited with earnings for the previous year in an amount less than the earnings that would have been credited pursuant to the assumed interest rate for that year determined by the Public Employees Retirement Board, the amount of the difference shall be credited to the regular account and charged to a reserve account in the fund established for the purpose. In years following the year for which a charge is made to the reserve account, all earnings on the regular accounts of members who established membership in the system before January 1, 1996, as described in ORS 238.430, and of alternate payees of those members, shall first be applied to reduce or eliminate the amount of a deficit. Only earnings on the regular accounts of members who established membership in the system before January 1, 1996, as described in ORS 238.430, and of alternate payees of those members, may be used to reduce or eliminate the amount of a deficit.

(2) Notwithstanding subsection (1) of this section and except as provided in subsection (5) of this section, the board may not credit any earnings to the regular accounts of members who established membership in the system before January 1, 1996, as described in ORS 238.430, or of alternate payees of those members, in any year in which there is a deficit in the reserve account established under subsection (1) of this section, or credit any earnings to the regular accounts of those members, or alternate payees, that would result in a deficit in that reserve account. In any year in which the fund experiences a loss, the board shall charge the amount of the loss attributable to the regular accounts of members who established membership in the system before January 1, 1996, as described in ORS 238.430, against the reserve account.

(3) The regular account for members who established membership in the system before January 1, 1996, as described in ORS 238.430, and for alternate payees of those members, may not be credited with earnings in excess of the assumed interest rate until:

(a) The reserve account established under subsection (1) of this section is fully funded with amounts determined by the board, after consultation with the actuary employed by the board, to be necessary to ensure a zero balance in the account when all members who established membership in the system before January 1, 1996, as described in ORS 238.430, have retired; and

(b) The reserve account established under subsection (1) of this section has been fully funded as described in paragraph (a) of this subsection in each of the three immediately preceding calendar years.

(4) The board may divide the reserve account established under subsection (1) of this section into one or more subaccounts for the purpose of implementing the provisions of this section.

(5) Subsection (2) of this section does not apply to a person who is a judge member of the system on June 30, 2003. [Formerly 237.277; 2001 c.945 §4; 2003 c.3 §1; 2003 c.67 §5; 2003 c.625 §10]

**459-007-0005**

**Annual Earnings Crediting**

(1) For purposes of this rule, "remaining earnings" means earnings available for distribution to a particular account or reserve after deduction of amounts required or authorized by law for other purposes.

(2) Except as otherwise specified in this division, earnings on all accounts and reserves in the Fund shall be credited as of December 31 of each calendar year in the manner specified in this rule.

(3) **Health insurance accounts.** All earnings attributable to the Standard Retiree Health Insurance Account (SRHIA), the Retiree Health Insurance Account (RHIA) or the Retirement Health Insurance Premium Account (RHIPA) shall be credited to the account from which they were derived, less administrative expenses incurred by each account, as provided in ORS 238.410, 238.415 and 238.420, respectively.

(4) **Employer lump sum payments.** All earnings or losses attributable to the employer lump sum payment accounts established under ORS 238.225(9) shall be credited to the accounts from which they were derived.

(5) **Administrative expenses.**

(a) Earnings on the Variable Annuity Account shall first be used to pay a pro rata share of administrative expenses in accordance with ORS 238.260(6). If the Variable Annuity Account experiences a loss, the loss shall be increased to pay a pro rata share of administrative expenses.

(b) Earnings attributable to Tier One regular accounts, the Tier One Rate Guarantee Reserve, Tier Two member regular accounts, employer contribution accounts, the Contingency Reserve, the Benefits-in-Force Reserve and the Capital Preservation Reserve shall first be used to pay the system's remaining administrative expenses under ORS 238.610.

(6) **Member variable accounts.** All remaining earnings or losses attributable to the Variable Annuity Account shall be credited to the participants of that account, as provided under ORS 238.260(6) and (7)(b).

(7) **Contingency Reserve.**

(a) In any year in which total earnings on the Fund equal or exceed the assumed rate, an amount not exceeding seven and one-half percent of remaining earnings attributable to Tier One member regular accounts, the Tier One Rate Guarantee Reserve, Tier Two member regular accounts, Benefits-in-Force Reserve, employer contribution accounts, the Capital Preservation Reserve and the Contingency Reserve shall be credited to the Contingency Reserve to the level at which the Board determines it is adequately funded for the purposes specified in ORS 238.670(1).

(b) The portion of the Contingency Reserve allowed under ORS 238.670(1)(a) for use in preventing a deficit in the fund due to employer insolvency may only be credited using earnings attributable to employer contribution accounts.

(8) **Tier One Member Deficit Reserve.** All remaining earnings attributable to Tier One member regular accounts and the Tier One Rate Guarantee Reserve shall be credited to the Tier One Member Deficit Reserve established in ORS 238.255(1) until the deficit is eliminated.

(9) **Capital Preservation Reserve.** Remaining earnings attributable to the Tier Two member regular accounts, employer contribution accounts, the Benefits-in-Force Reserve, the Contingency Reserve and the Capital Preservation Reserve may be credited from those sources to one or more reserve accounts that may be established under ORS 238.670(3) to offset gains and losses of invested capital.

(10) **Tier One member regular accounts.** All remaining earnings attributable to Tier One member regular accounts and the Tier One Rate Guarantee Reserve shall be credited to Tier One member regular accounts at the assumed rate in any year in which the conditions set out in ORS 238.255 have not been met. Crediting under this subsection shall be funded first by all remaining earnings attributable to Tier One member regular accounts and the Tier One Member Rate Guarantee Reserve, then moneys in the Tier One Member Rate Guarantee Reserve.

(11) **Tier One Member Rate Guarantee Reserve.** In any year in which the Tier One Member Deficit Reserve has a zero balance, remaining earnings attributable to Tier One member regular accounts, the Tier One Member Rate Guarantee Reserve, the

Benefits-in-Force Reserve, and the Contingency Reserve may be credited to the Tier One Member Rate Guarantee Reserve established under ORS 238.255(1).

(12) **Tier Two member regular accounts.** All remaining earnings or losses attributable to Tier Two member regular accounts shall be credited to all active and inactive Tier Two member regular accounts under ORS 238.250.

(13) **Benefits-in-Force Reserve.** Remaining earnings attributable to the Benefits-in-Force Reserve, the Contingency Reserve, the Capital Preservation Reserve and employer contribution accounts, in that order, shall be used, to the extent available, to credit the Benefits-in-Force Reserve with earnings up to the assumed rate for that calendar year in accordance with ORS 238.670(2).

(14) **Employer contribution accounts.** All remaining earnings attributable to employer contribution accounts shall be credited to employer contribution accounts.

(15) **Remaining earnings.** Any remaining earnings shall be credited to accounts and reserves in the Fund at the Board's discretion.

(16) The provisions of this rule shall be applied retroactively to April 15, 2004.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238

Hist.: PERS 8-2004, f. & cert. ef. 4-15-04; PERS 18-2005(Temp), f. & cert. ef. 10-26-05 thru 4-19-06





# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator, PPLAD  
SUBJECT: Further Development of 2009 Legislative Concepts

|              |                                   |
|--------------|-----------------------------------|
| MEETING DATE | 3/28/08                           |
| AGENDA ITEM  | C.2.<br>2009 Legislative Concepts |

At the PERS Board's February 15, 2008 meeting, staff reported on the efforts to date to develop legislative concepts for introduction to the 2009 Oregon Legislature's regular session. As a result of that discussion, staff will be submitting three concepts through the Department of Administrative Services' (DAS) process for further development. Briefly, those three concepts are:

1. Re-Employed Retired Members: Applying the 1039 hour exception to all benefit recipients regardless of the benefit payment option selected by the retired member in the PERS Chapter 238 Program.
2. Tier Two & Disability Benefits: Correct the actuarial reduction oversight on Tier Two disability benefits and extend the initial payment deadline from 10 days to 15 business days.
3. Tax Qualification: Update the PERS Plan's provision for changes in the federal tax code in preparation for submitting the Plan for a tax qualified status determination letter from the IRS.

Each of these concepts is explained in more detail later in this memo. Through the course of the coming months, Legislative Counsel will draft proposed language for each concept and PERS staff will compile the research to inform the PERS Board's decision, to occur later in the fall, on whether these concepts should be submitted to the Governor's Office for introduction and consideration in the 2009 session.

### LEGISLATIVE CONCEPT DEVELOPMENT TIMELINE

- |                   |  |
|-------------------|--|
| April 4, 2008     | Deadline for submitting concepts to the DAS/Governor's Office initial review process for 2009 legislative session.   |
| June 20, 2008     | Finalize response to DAS/Governor's office inquiries (e.g., language for placeholder concepts) as all agency additional information is due to them by July 14, 2008. |
| Oct/Nov 2008      | PERS Board reviews draft concepts returned from Legislative Counsel and decides whether to submit the concept to the Governor's Office for introduction.             |
| December 15, 2008 | Deadline for Governor to pre-session file agency bills.  |
| January 12, 2009  | Session begins.  |

## **LEGISLATIVE CONCEPT #1: RE-EMPLOYED RETIRED MEMBERS**

### OVERVIEW

- Concept: Provide a more consistent application of the return-to-work standard regardless of the benefit option chosen by the retired member in the PERS Chapter 238 Program.
- Reason: Statute currently provides different parameters and consequences for retired members who elect different benefit payment options.

### BACKGROUND

The PERS Chapter 238 Program contains varying restrictions and consequences for a retired member who returns to work with a PERS-covered employer. Currently, ORS 238.078 explains the consequences to a retired member if they return to PERS-covered employment. Those consequences depend on whether the member was retired for more or less than six months. Retirement benefits cease and repayment of benefits received may be required.

ORS 238.082 provides an exception to ORS 238.078 in several respects, the most common of which is to allow a retired member to work less than 1040 hours in a calendar year without being subject to any of the consequences under ORS 238.078. This exception only applies to retired members who are receiving a monthly service retirement allowance. Members who elect a total lump sum option or are forced to receive a lump sum payment in lieu of a small allowance under ORS 238.315 do not fall under this exception. This “exception to the exception” is not widely understood. That confusion and the complex standard for permissible employment has resulted in numerous inadvertent violations. Members have incurred unexpected repayment obligations and faced tax implications for lump-sum payments rolled to qualified plans. Administration has been disproportionately burdensome for stakeholders and staff.

The proposed concept would extend the provisions of ORS 238.082 to retired members who elect the total lump sum option or are paid a lump sum in lieu of a small allowance. By applying the more commonly understood 1,039-hour exception to all Chapter 238 retired members the concept provides a uniform standard that avoids the disparate treatment of retired members during the first six months after retirement. The concept also adds provisions to ORS 238.078 to clarify the administration of lump-sum payments for retired members who return to employment as active members after six months from retirement and clarifies the obligation of the member to resume employee contributions.

### LAC AND OTHER STAKEHOLDER COMMENTS

The PERS Board’s Legislative Advisory Committee discussed parameters for re-employed retired members at its meeting on December 4, 2007. The Committee did not develop an overall consensus position. Greg Hartman, on behalf of the PERS Coalition, did express broad support for a legislative concept that would “close the loopholes” in the current structure of exceptions so that the consequences for retired members would be more predictable and consistent. There appeared to be some consensus for such clarification and consistency. Staff feels the concept as presented provides more predictable, consistent parameters and consequences.

## **LEGISLATIVE CONCEPT #2: TIER TWO & DISABILITY BENEFITS**

### OVERVIEW

- **Concept:** Remove the actuarial reduction on disability retirement benefit calculations for Tier Two members because of their normal retirement age. Establish a more reasonable guideline for initial disability benefit payment.
- **Reason:** Correct statutes and set realistic administrative expectations.

### BACKGROUND

Disability retirement benefit calculations involve calculating a pension as if the member had worked until reaching age 58 (for members who are not P&F), and then retired for service. That is the normal retirement age for Tier One. Non-P&F Tier Two members have a different normal retirement age of 60 (ORS 238.435(5)).

The interplay of this calculation with early retirement eligibility was not addressed when Tier Two was created in 1996. ORS 238.280 directs that anyone who retires early will receive a reduced, retirement benefit that is actuarially equivalent to the allowance provided at normal retirement age. Reading the requirement in ORS 238.320 to calculate the disability retirement as if the member worked to age 58 and then retired for service, together with the actuarial reduction for early retirement in ORS 238.280, Tier Two members who receive a disability retirement benefit have that benefit actuarially reduced, but Tier One members do not. The concept eliminates the actuarial reduction on Tier Two disability benefits.

As a separate issue, ORS 238.455(1)(b) provides that disability retirement benefit payments must start within 10 days after the member's application is approved. That narrow window presents some logistical challenges that raise processing and internal controls concerns. The concept extends the deadline to a more realistic 15 business days.

### LAC AND OTHER STAKEHOLDER COMMENTS

The Tier Two aspect of this concept was suggested by the PERS Coalition after a particular member questioned their disability benefit calculation and why the actuarial reduction was applied. The LAC briefly discussed this concept when it was first raised at its December 4, 2007 meeting and again at the January 23, 2008 meeting. Comments were supportive of the concept; some members cautioned that the deadline extension should be measured but realistic.

## OVERVIEW

- Concept: Changes the date of federal tax law applicable to the plan; updates the plan to allow members to roll over after tax dollars.
- Reason: Maintaining tax qualified status of PERS Plan.

## BACKGROUND

Retirement plans are now required to submit their plans for a determination of their tax qualified status on a six-year cycle. The cycle for government plans, like PERS, runs until January 31, 2009. Before that time, PERS will need to submit its application for a plan determination letter.

Since the last determination letter PERS received after the 2003 reform legislation, federal tax law has changed in many respects. This concept would adopt the statutory changes necessary to conform our statutes to these new provisions. Most notably, Internal Revenue Code provisions are often referred to in our statutes with specific dates the statutes were enacted. To be updated, the date references need to be re-adopted to incorporate the changes to the IRC provisions.

The concept updates the PERS plan to comply with federal tax law changes required for plan qualification, such as the Pension Protection Act of 2006. These changes must be incorporated into the plan to meet the standards for a favorable determination letter from the IRS. Updating the date of the applicable federal tax law will, by reference, incorporate these recent changes. This concept also updates language in ORS 238A.430 to allow the rollover of after-tax dollars.

## LAC AND OTHER STAKEHOLDER COMMENTS

This concept was discussed briefly with the Legislative Advisory Committee at its January 23, 2008 meeting. As the analysis had not been completed by that meeting, we weren't able to share the details of these changes. We did express our expectation that there would not be any significant changes necessary, and the analysis confirmed the minimal changes reflected in this concept draft should be sufficient.



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board  
FROM: Steven Patrick Rodeman, Administrator  
Policy, Planning, and Legislative Analysis Division

SUBJECT: Delegation Options in Contested Cases

|              |   |
|--------------|---|
| MEETING DATE | <b>03/28/2008</b>                                 |
| AGENDA ITEM  | <b>C.3.<br/>Delegation in<br/>Contested Cases</b> |

The 2007 Oregon Legislature adopted HB 2423, amending the Administrative Procedures Act, ORS Chapter 183. That Act governs the contested case process. A new provision was added (ORS 183.411) that now allows the PERS Board to delegate the authority to enter a final order. This delegation can be made for a proceeding or class of proceedings and to an officer or employee, or class of officers or employees. At its February 15, 2008 meeting, the PERS Board asked that staff return with some options for the parameters of that potential delegation.

### CLASS OF PROCEEDINGS

Generally, PERS has classified its contested cases into two groups: disability and non-disability. The disability contested cases deal with whether a member has met the requisite standard for a disability retirement benefit. The other cases deal with any other type of issue (calculations, eligibility, etc.). Historically, each class has been roughly equal in number of cases, not counting the recent spike of non-disability contested cases requested by benefit recipients in the *Strunk/Eugene* adjustment project.

Disability contested cases involve a thorough review of sometimes voluminous medical records to reach a decision on a relatively clear legal standard: is the member unable to perform any work for which he or she is qualified? In these cases, the challenge is sorting, sifting, and weighing the medical evidence to decide whether the member has met the burden of proving that he or she meets the disability standard.

Non-disability contested cases do not usually involve a dispute of the facts but rather challenge one or more provisions of the PERS Plan as the agency staff has applied it. Usually, in this type of contested case, the question is whether the staff correctly applied an established law, rule, or policy, or challenges the established practice by advocating for a different policy or interpretation.

Should the PERS Board consider delegating its final order authority by class, the disability contested cases lend themselves best to such a delegation. The Administrative Law Judge is charged with reviewing the entire record and coming up with Findings of Fact. The resulting Conclusions of Law are generally made in accordance with a well defined standard. Absent an independent review of the record, the PERS Board has usually adopted the ALJ's findings, with some technical corrections for dates, names, exhibit numbers, etc. This class of proceedings therefore best lends itself to the PERS Board delegating final order authority to an officer or employee.

### DELEGATION TO OFFICER OR EMPLOYEE

In deciding whether to delegate final order authority to an officer or employee of the agency, two principle considerations are timing and scope.

- Timing: After the ALJ issues a proposed order, the parties have 45 days to file exceptions or comments, after which the ALJ considers whether to issue an amended proposed order. Incorporating that sequence into the schedule of a PERS Board full meeting can delay issuance of a final order for several weeks after the ALJ has completed his or her work. By delegating final order authority to an officer or employee, the contested case could reach resolution sooner.
- Scope: Historically, the PERS Board has adopted the ALJ's proposed order in the substantial majority of cases. Generally, that's because the ALJ's opinion was based on a settled area of law, rule, or policy. Sometimes, however, the contested case presents an issue that hasn't been so clearly defined or on which the PERS Board may decide to change its direction. In those limited cases, the full PERS Board may want to retain final order authority so the policy change or clarification is within its purview. If the PERS Board does delegate final order authority to an officer or employee, it may want to reclaim that authority in these particular cases.

As to whom the PERS Board may delegate final order authority, the new provision specifies that it be to an officer or employee of the agency, or a class of officers or employees. The PERS Board could delegate to one or more of its members. If authority is delegated to more than one board member, the delegation should clarify whether either of those members could issue a final order or if they must do it collectively. If the PERS Board chooses to delegate final order authority to an employee, the Executive Director is an obvious choice and could further delegate final order authority so a subordinate under OAR 459-001-0025 if necessary in a particular circumstance.

#### STAFF RECOMMENDATION

Delegating final order authority makes the most sense in disability contested cases where the ALJ does the yeoman's work in analyzing the record to decide whether the member has met his or her burden of proof. Delegating this authority would resolve these cases more quickly, which is important since these cases always deal with entitlement to benefit payments and reaching that resolution timely is in all parties' best interests.

As to non-disability cases, delegation would allow those cases to be resolved more quickly but the PERS Board does lose some visibility to the issues presented. Unless the contested case presents an issue where application of the law, rule, or policy is unclear, the final order does little more than ratify the ALJ's opinion. If staff needs policy clarification or advocates for a different result than the ALJ's, the delegation could require that those cases be brought to the full Board for consideration.

Delegating authority to one or more board members does alleviate the delay in holding cases until a regular board meeting. If the PERS Board does decide to delegate authority to an employee, staff recommends that delegation be limited to the Executive Director and only if the final order upholds the ALJ's result (allowing for technical corrections).

BOARD OPTIONS

1. Adopt a motion to delegate final order authority in contested cases to one or more named PERS Board members, directing whether the named members may act individually or must decide together on issuing a final order.
2. Adopt a motion to delegate to the Executive Director the authority to issue a final order but only in those cases where the final order upholds the ALJ's Findings of Fact and Conclusions of Law, with technical corrections that do not affect the result.
3. Adopt a motion to delegate to the Executive Director the authority to issue a final order but only in cases addressing a member's eligibility for a disability benefit.
4. Adopt a motion delegating final order authority in a specified class of cases to a PERS officer or employee under other specified circumstances.
5. Do nothing. Final order authority would be retained with the full PERS Board.

**ADDITIONAL ITEMS FOR PERS BOARD**  
**March 28, 2008**

**1. Agenda Item B.8.            Temporary Adoption of Creditable Service/Retroactive Salary Payments Rules**

November 28, 2007 Greg Hartman Letter:  
Reinstatement of Service

January 16, 2008 City of Eugene Attorney Letter:  
Rulemaking – Reinstatement of Creditable Service

March 26, 2008 City of Eugene Attorney Letter:  
Adoption of Proposed Rule – Creditable Service

**2. Agenda Item C.1.            2007 Final Earnings Crediting**

March 28, 2008 Staff Update on Final postings of 2007 Calendar Year Transactions and Earnings



**BENNETT, HARTMAN, MORRIS & KAPLAN, LLP**

ATTORNEYS AT LAW

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November 28, 2007

*BY EMAIL AND MAIL*

Steve Delaney  
Deputy Director  
Public Employees Retirement System  
PO Box 23700  
Tigard, OR 97281-3700

Re: Reinstatement of Service  
Our File No.: 5415-237

Dear Steve:

Over the last year or so there have been discussions both at the staff and the board level about the issues which arise when an employee who has been terminated is reinstated either by court order, arbitrator's order, or agreement of the parties with the payment of full back pay and benefits. Because of some ambiguity in the PERS statutes it is my understanding that to date PERS has expressed a reluctance to receive such payments from the employer and more importantly to reinstate service for the time that the member was improperly not employed.

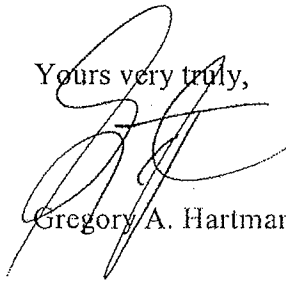
While nothing in the PERS statutes is ever absolutely clear the definition of creditable service (ORS 238.005(5)) is focused on the period of time in which a member is entitled to the payment of salary and benefits. The definition of creditable work service requires that the member be an "active member" but I would maintain that in the circumstance where an employee has been put back to work with full benefits, that individual has never lost their active member status. While this is not meant to be an exhaustive analysis of the PERS statutes on this topic, a member who receives a back pay award is clearly within the scope of the creditable service statute.

If PERS does not permit full reinstatement in this situation it obviously causes a hardship to the employee but also likely causes a substantial hardship for employers. An arbitrator or a judge who has ordered reinstatement and is told that that cannot be fully accomplished will no doubt be urged to consider an alternative remedy which would involve additional direct payments from the employer. Clearly as a policy matter full reinstatement in these circumstances is in the best interests of all stakeholders.

Steve Delaney  
November 28, 2007  
Page 2

I believe there is an opportunity for rulemaking in this circumstance which would allow these issues to be addressed in a constructive manner, which would be in the best interests of all stakeholders and consistent with the statutory scheme. After you've had a chance to review this I would appreciate your letting me know whether the PERS staff believes that rulemaking would be an appropriate response. If it would facilitate the process I would be happy to prepare a proposed rule for initial consideration. I look forward to hearing from you.

Yours very truly,



Gregory A. Hartman

GAH:kaj

G:\Hartman\AFSCME 5415237 PERS 2\Delaney 07-11-28.vpd

cc: Clients (by email only)  
Bill Gary (by email only)



City Attorney  
Civil Department

City of Eugene  
360 East 10th Avenue, Suite 300  
Eugene, Oregon 97401  
(541) 682-5080

January 16, 2008

Steve Delaney  
Deputy Director  
Public Employees Retirement System  
PO Box 23700  
Tigard, OR 97281-3700

Re: Rulemaking – Reinstatement of Creditable Service

Dear Steve:

I am writing today on behalf of the City of Eugene, and in support of Greg Hartman's letter of November 28, 2007, to encourage you and the Public Employees Retirement Board to adopt rules to clarify the issues which arise when a previously terminated employee is reinstated with full back pay and benefits either by court order, order of an arbitrator, or agreement of the parties. Specifically, employees reinstated with back pay, benefits and seniority should be credited with creditable service for the period in which they are deemed employed by virtue of an arbitrator's or a court's order.

Such a rule finds support in the statutory definition of "creditable service" as "any period of time during which an active member is being paid a salary by a participating public employer and for which benefits under this chapter are funded by employer contributions and earnings on the fund." ORS 238.005(5). In turn, "salary" is defined as "the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer . . . ." ORS 238.005(21)(a).

Oregon public policy has traditionally favored the practice of collective bargaining between employers and employees and the arbitration procedures attendant with such collective bargaining. An arbitrator's traditional remedy upon finding that an employee has been wrongfully terminated is to order that the employee be "made whole." In other words, an employee judged to be wrongfully terminated is to be put in the same position as if that employee had not been terminated and continued in the employ of the public employer. The Board's past reluctance to reinstate creditable service for a person who has been on salary (back wages) and deemed to have been continuously employed by an arbitrator fails to give due regard for arbitration authority and for the broad sweep of the definition of "creditable service" in the statute.


Steve Delaney  
January 16, 2008  
Page 2

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A rule addressing these issues would protect the public employee, who would otherwise be unable to have his or her creditable service reinstated. It also avoids confusion regarding damage awards and additional expenses to all parties. Without the ability to order reinstatement of creditable service, the arbitrator is forced to consider, and the parties are left to argue about, possible alternative remedies. However, because the loss of creditable service does not in itself cause an improperly terminated employee economic damage, there is no clear alternative remedy. Therefore, both the public employer and the public employee are likely to end up spending more time and money trying to determine how to measure the harm caused by the loss of creditable service time.

In sum, there is presently an opportunity for rulemaking to clarify these issues in a constructive manner to the benefit of all interested parties, all while remaining consistent with the current statutory scheme. Therefore, on behalf of the City of Eugene, I encourage the Board to take up the rulemaking suggested above and in Greg Hartman's letter of November 28, 2007.

HARRANG LONG GARY RUDNICK P.C. –  
CITY ATTORNEYS



William F. Gary

WFG:mas  
cc: Jeff Perry  
Gregory A. Hartman  
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City Attorney  
Civil Department

City of Eugene  
360 East 10th Avenue, Suite 300  
Eugene, Oregon 97401  
(541) 682-5080

March 26, 2008

**HAND DELIVERED**

Board Members  
Public Employees Retirement Board  
11410 S.W. 68th Parkway  
P.O. Box 23700  
Tigard, OR 97281-3700

Re: Adoption of Proposed Rule – Creditable Service

Dear Members of the PERS Board:

I am writing today on behalf of the City of Eugene, and in support of the proposed amendments to OAR 459-010-0014 and OAR 459-010-0042, relating to creditable service. The City has described the authority for such rule changes in a letter to PERS's Deputy Director dated January 16, 2008. Those comments will not be repeated here.

There is a present need for the adoption of the amendments under consideration. Presently, PERS rules do not provide for the granting of creditable service when an employee previously separated from service is restored to employment as a result of an arbitration award or private settlement agreement.

Typical of such reinstatements is an award that the employee be made whole from the effective date of separation, with back pay, benefits, seniority, and other privileges of employment. Following such an award, a public employer pays back pay to the reinstated employee, and often remits to PERS any associated member and employer contributions.

Without rule amendments, however, PERS lacks clear guidance on restoring creditable service, and employers and employees do not know what to expect. The lack of guidance has led to protracted arbitration proceedings for the City of Eugene and one of its employees, in one instance in the last four months. The rule amendments under consideration will provide much needed clarification, and will prevent some of the protracted remedy disputes that ensue in the absence of clear guidance. I note that the arbitrator in that case concluded the rule change under consideration was just, fair, and consistent with the make-whole award that he rendered; he requested specifically that his conclusion be shared with the Board as it considers adopting the proposed rule amendments.

The absence of clear guidance on the granting of creditable service under these circumstances has prevented at least one City of Eugene employee from retiring when she otherwise would have. That person is presently employed by the City. The proposed

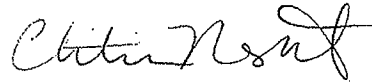
Members of the PERS Board  
March 26, 2008  
Page 2

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amendments will allow PERS to grant the creditable service to this employee, consistent with the arbitrator's "make whole" order, and will provide her with enough creditable service should she wish to retire now. I suspect there are other, similarly situated persons throughout Oregon who await this clarification.

For the foregoing reasons, the City of Eugene urges adoption of the proposed rule amendments.

HARRANG LONG GARY RUDNICK P.C. –  
CITY ATTORNEYS



Christine Nesbit

CN:nas  
cc: Client  
00195661.DOC;1



# Oregon

Theodore R. Kulongoski, Governor

## Public Employees Retirement System

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March 28, 2008

TO: Members of the PERS Board

FROM: Dale S. Orr, Coordinator, Actuarial Analysis Section

SUBJECT: **Update:** 2007 Final Earnings Crediting and Reserving

### EXECUTIVE SUMMARY

Final posting of 2007 calendar year transactions and earnings had little effect on what was reported to the Board in February. Total reserves in the Regular Account Fund increased from a preliminary \$62,819.3 million to a final \$62,823.3 million (as of December 31, 2007). Available 2007 Regular Account earnings increased slightly from a preliminary \$5,770.5 million to a final \$5,775.3 million. These small adjustments resulted in only minor changes to the preliminary crediting rates reported to the Board and the Legislature's Ways and Means Committee in February.

The final earnings amounts, reserve balances, and related crediting rates are itemized on the attached chart. These numbers are based on the Board's preliminary decision to credit the full 7.5% of available earnings to the Contingency Reserve.

### FINAL EARNINGS CREDITING

Staff crediting recommendations and proposed motions can be found on page 3 of 4 of the "Final 2007 Earnings Crediting and Reserving" report provided with the Board packet.

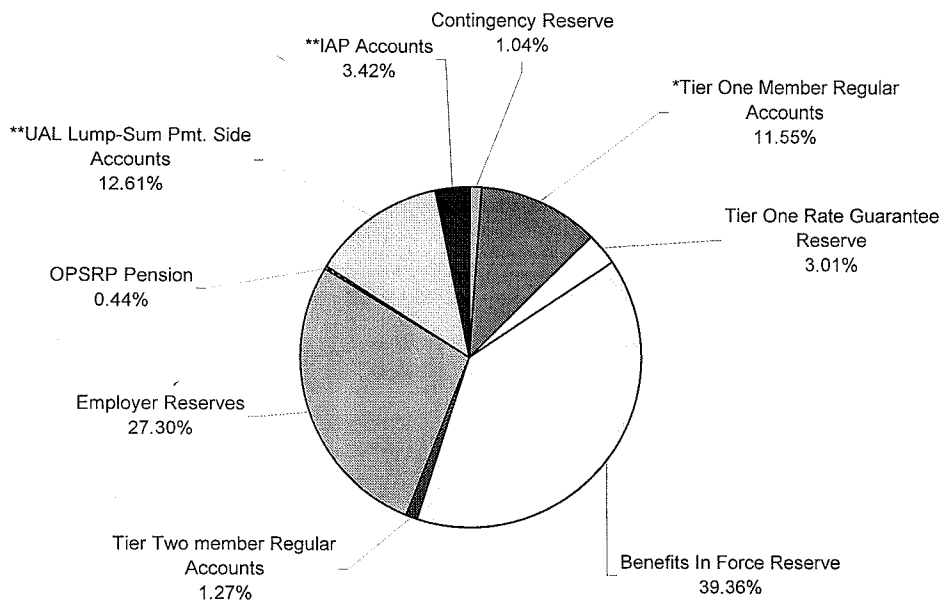
Attachment:

Chart: \$357.9 Million (Maximum) Additional to Contingency Reserve

**2007 Final Earnings Crediting**  
**\$357.9 Million (Maximum) Additional to Contingency Reserve**  
**(All dollar amounts in millions)**

| Regular Account Reserve           | Reserves Before Crediting | 2007 Earnings    | Reserves After Crediting | 2007 Rates |
|-----------------------------------|---------------------------|------------------|--------------------------|------------|
| Contingency Reserve               | \$295.3                   | \$357.9          | \$653.2                  | N/A        |
| *Tier One Member Regular Accounts | 6,722.6                   | 536.4            | 7,259.0                  | 7.97%      |
| Tier One Rate Guarantee Reserve   | 1,635.4                   | 253.8            | 1,889.2                  | N/A        |
| Benefits In Force Reserve         | 22,586.9                  | 2,139.9          | 24,726.8                 | 9.47%      |
| Tier Two member Regular Accounts  | 727.6                     | 68.9             | 796.5                    | 9.47%      |
| Employer Reserves                 | 15,666.0                  | 1,484.3          | 17,150.3                 | 9.47%      |
| OPSRP Pension                     | 257.8                     | 17.3             | 275.1                    | 6.70%      |
| **UAL Lump-Sum Pmt. Side Accounts | 7,193.7                   | 731.1            | 7,924.8                  | Various    |
| **IAP Accounts                    | 1,962.7                   | 185.7            | 2,148.4                  | 9.46%      |
| <b>Total</b>                      | <b>57,048.0</b>           | <b>\$5,775.3</b> | <b>\$62,823.3</b>        |            |

**2007 Regular Account Reserve Balances**  
**After 2007 Crediting**



\*Strunk members' attorney fees of \$1.4 million deducted from 2007 Tier One member Regular Account earnings

\*\*Informational only. Not affected by Board reserving or crediting decisions.