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DATE: November 22, 2005

TO: Wisconsin Retirement Board

FROM: Diane Poole, Director
Disability Programs Bureau

SUBJECT: Duty Disability Program Inequities

On September 22, 2005, the Wisconsin Retirement Board requested that the Disability Programs Bureau identify inequities in the Duty Disability Program (40.65) and suggest possible remedies. The benefits and eligibility criteria for the Duty Disability Program are set forth in detail in the statutes, and has been the subject of a case (Coutts) that was decided by the Supreme Court. Thus, many of the proposed changes suggested below could only be enacted through legislative action.

Since the Board requested this list for discussion purposes, we are not asking for Board action at this time.

Background

The Duty Disability Program (§40.65) was created in 1982 as a successor program to the old §66.191 program. The §66.191 program provided a benefit of 50% of a protective employee's earnings if that employee became disabled as a result of a duty-incurred injury or disease. The benefit was a flat benefit that was neither indexed for inflation nor offset for other benefits that may be available to the applicant. This resulted in benefits that were inadequate to provide a reasonable standard of living; that became inadequate through the erosion caused by inflation; or in some cases were deemed excessive because the availability of other benefits or income from other employment far surpassed the applicant's salary prior to the disability. Further, although the availability of these §66.191 benefits was required under law, there was no state-sponsored program available to provide the coverage. As a consequence, the benefits costs were paid by the employers on a "pay-as-you-go" basis without benefit of co-insurance to share the risk, or pre-funding to minimize the obligation.

Subsequently, the §40.65 Duty Disability Program was created to address some of these problems. The program was placed with the Department of Employee Trust Funds with an expectation that the Department would develop a contribution system similar to the retirement system's that would, in large measure, pre-fund the benefits and provide a measure of stability, equity, and a spread of the risk. The benefits were restructured to create a floor of 80% of former earnings, indexed for life, and offset by any other income to which the applicant may have access. In 1988, major changes were enacted to restructure the benefit level (75% up to 80%) dependent on the severity of the disability and approval of other disability benefits. Some

Reviewed and approved by Tom Korpady, Administrator

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offset and death benefit provisions were also restructured. State protective occupation participants were exempt from these changes, as they were not ratified through collective bargaining.

Although the §40.65 changes did resolve many of the problems identified with the §66.191 program, some problems remained, and others were newly created. The following is a list of problems with the current program as identified by staff, along with suggested remedies. The list is in no particular order, and although some of the suggested changes would resolve more than one of the identified problems, they could all be taken as individual possible remedies that would provide incremental improvements.

1. **The most disabled participants receive a lesser Duty Disability benefit because other benefits they receive (Social Security Disability Insurance, WRS Disabilities, etc.) are usually taxable and offset from the Duty Disability benefit.**

   For example, a 100% disabled individual may never receive the non-taxable Duty Disability benefit while an individual with a less than 10% disability (who is not eligible for other benefits) will receive the full non-taxable Duty Disability benefit.

   The 1988 legislative changes recognized this inequity by changing the Duty Disability benefit from a 50% flat benefit for all recipients to a range of 75%-80% benefit (dependent on eligibility for other disability benefits). If the recipient is eligible for another benefit, they receive 80% rather than 75%.

   <u>POSSIBLE REMEDY</u>: Explore carrying the legislative intent further by adjusting the range to be consistent with the industry standard and continue to tie it to eligibility for other benefits.

2. **There is a problem with program design in that there is a disconnect between the Duty Disability program and Worker's Compensation.** Some employers try to shift liability from Worker's Compensation to the 40.65 Program. They won't certify a person for Duty Disability benefits, unless the individual waives his/her workers compensation benefits. This creates a greater liability for the Duty Disability Program.

   <u>POSSIBLE REMEDY</u>: Explore reconnecting the Duty Disability Program and Worker's Compensation.

3. **Duty Disability benefits are guaranteed for the life of the recipient, regardless of any change in circumstances, including recovery from the disability.**

   <u>POSSIBLE REMEDY</u>: Enable the Department to do follow-up medical reviews if there is evidence of the recipient's recovery. Legislation to this effect was considered several years ago because it was recognized that there is possibility for full recovery in some cases.

4. **The employer is required by law to certify the disability is work-related, even though the employer may have already paid Worker's Compensation benefits.**

   <u>POSSIBLE REMEDY</u>: Modify statute and rule to only require employer certification of work relatedness when no Workers' Compensation determination has been made.

5. **State benefits are paid differently than local benefits.** State employees are paid at 80% of salary while local employees may be paid at 75%; cancer presumptive death benefits are also paid differently.

   POSSIBLE REMEDY: Ask the State, as part of the collective bargaining process, to consider consistent provisions.

6. **The law allows Duty Disability recipients to take a separation benefit. Death benefits from retirement are then no longer available to the surviving spouse.** This option provides a higher non-taxable Duty Disability benefit, which increases the cost to the employer.

   POSSIBLE REMEDY: This issue was already recognized and addressed in the cancer presumptive law and could be extended to the entire Duty Disability program.

7. **Annual benefit increases are hard to administer as they are based on the individual's age and other benefits received - even though these other benefits have the same benefit increase (and are not based on an individual's unique circumstances).**

   POSSIBLE REMEDY: For ease of administration and understanding for the recipient, standardize the rate that is used for annual salary indexing.

8. **Offsets are applied to the Duty Disability benefit based on the *Coutt's* decision – by date of check.** For instance, an individual receives Duty Disability benefits for a gunshot injury and then receives Worker's Compensation for an old back injury. This worker's compensation is currently offset from the Duty Disability benefit based on date of check.

   POSSIBLE REMEDY: Clarify statute and rule to offset Worker's Compensation benefits only for the same injury/illness.