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CORRESPONDENCE MEMORANDUM

DATE: November 14, 2013

TO: Employee Trust Funds Board
Teachers Retirement Board
Wisconsin Retirement Board

FROM: David H. Nispel, General Counsel

SUBJECT: Status of County Jailers Appeals

This memo is for informational purposes only. No Board action is required.

This memo is an update regarding the status of the large number of appeals that have been filed on behalf of county jailers who have been reclassified by their employers from “protective occupation participants” to general employees for Wisconsin Retirement System (WRS) purposes. Appeals of this nature, where an employee appeals an employer’s action (rather than a department determination by ETF) directly to an administrative law judge, are referred to as “direct appeals.” Appeals such as these that deal with an employer’s classification of an employee are heard by the ETF Board pursuant to Wis. Stat. §§ 40.03(1)(j) and 40.06(e).

As of this date, 102 jailers from seven counties have appealed their reclassifications. No appeals have been filed since October, but it is possible more will be filed. The seven counties are Bayfield, Chippewa, Clark, Dunn, Kewaunee, Marquette, and Ozaukee. All seven counties are represented by the same attorney.

ETF’s Special Consultant to the Deputy Secretary met with the attorneys for the counties and appellants in late April, and they verbally agreed that ETF would send one case from each county to the Division of Hearings and Appeals for a hearing before an Administrative Law Judge. Attorneys for the appellants are currently determining which cases will be sent for hearing. Until the parties begin litigating, ETF does not know for certain what the issues will be, but at this time it appears that the primary issue will be whether the appellant’s “principal duties” in a given county are within the scope of “active law enforcement” as required by the statutory definition of “protective occupation participant” found at Wis. Stat. § 40.02(48)(a).

Reviewed and approved by Robert J. Marchant, Deputy Secretary

Electronically signed 11/19/13

Board	Mtg Date	Item #
ETF	12.5.13	5C

Also of note, on July 25, 2013, the Wisconsin Court of Appeals issued a decision on a related case which invalidated Douglas County's attempt to diminish their jailers' collective bargaining rights by claiming they are not "public safety employees" within the meaning of the Municipal Employment Relations Act (MERA). As you know, 2011 Wisconsin Act 10 ("Act 10") significantly reduced collective bargaining rights for all public employees, other than public safety employees, by limiting bargaining to base wages only.

In the Douglas County case, (*Local 441A v. Wisconsin Employment Relations Commission, Appeal No. 2012AP2721*), all parties agreed that the county's jailers were "protective occupation participants" under Wis. Stat. § 40.02(48)(a), and as such, their principal duties included active law enforcement. Therefore, the court found that they meet MERA's requirement that they must be employed as "deputy sheriffs" under Wis. Stat. § 40.02(am)3. in order to be considered public safety employees.

The issue in the Douglas County case is different than the issue in the pending appeals mentioned above. Douglas County challenged the jailers' status as public service employees under MERA by requesting a ruling on the matter from the Wisconsin Employment Relations Commission. The county argued that while the jailers were protective occupation participants for purposes of retirement, they were not deputy sheriffs, which is one of the five types of protective employment considered "public safety" under MERA. The court said this was not possible.

The seven counties mentioned above are reclassifying their jailers as general employees with ETF and no longer considering them "protective." In these appeals, the jailers are appealing the counties' action by claiming they meet the definition of "protective occupation participant." This will have the effect of toughening the rules for retirement, such as raising the minimum retirement age from age 50 to 55. It could possibly also make it easier to argue that they should not be considered deputy sheriffs under MERA.

I will be available at the December 5, 2013, Board meeting to answer questions.