

Testimony to the SAVA Committee

Carole Carey, PER Board President

November 30, 2005

Chairman Tash, members of the committee, I am Carole Carey, President of the Montana Public Employees Retirement Board. I am here to make a comment about the autonomy of the Board and offer some of the history of how and why we attained our autonomy.

To begin this process we must first look to the Article VIII, section 15 of the Montana Constitution, adopted by the voters in 1994 as Constitutional Amendment 25 (bold added for emphasis).

Section 15. Public retirement system assets. (1) Public retirement systems shall be funded on an actuarially sound basis. Public retirement system assets, including income and actuarially required contributions, shall not be encumbered, diverted, reduced, or terminated and shall be held in trust to provide benefits to participants and their beneficiaries and to defray administrative expenses.

(2) **The governing boards of public retirement systems shall administer the system**, including actuarial determinations, as fiduciaries of system participants and their beneficiaries.

The following is from a legal opinion delivered by Gregory Petesh, Legal Services Director of the Montana Legislative Services Division on September 30, 1996, when the legislature was considering amendment of the statute concerning the retirement boards' hiring authority (bold added for emphasis).

The constitution is a limit on and not a grant of power to the Legislature. **The Legislature is clearly precluded from assigning the administration of public retirement system assets to an entity other than the governing boards of the public retirement systems.**

... section 19-2-404, MCA [1995], appears to conflict with the statutory and constitutional provisions. It is virtually impossible to justify the disparate statutes governing the hiring of personnel for the retirement boards in light of Article VIII, section 15, of the Montana Constitution, placing the boards in the same trustee and fiduciary status. Allowing the boards that are constitutionally assigned the duty of administering the public retirement systems to hire their own personnel is legally defensible. A delegation of authority from the Legislature to an Executive Branch agency to hire personnel for an entity given constitutional recognition, duties, and fiduciary responsibility for administration is suspect.

Partly as a result of this opinion, the legislature amended Section 19-2-404, effective July 1, 1997. Ch. 532, L. 1997

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The current statutory language contained in Section 19-2-404, MCA says: "The board shall hire and fix the compensation of an executive director and other necessary employees to assist the board in administering the retirement systems. The compensation of the executive director and employees must be established in accordance with Title 2, chapter 18."

Chapter 532, L. 1997, which amended Section 19-2-404, MCA, fulfilled the constitutional promise of Constitutional Amendment 25 (the Public Pension Protection Act), that administration pension benefits and pension trust will not become a political tool of either the legislature or the executive branch. CA-25 was endorsed by Governor Racicot, approved by the 1993 legislature overwhelmingly, and approved by Montana voters overwhelmingly.

The PER Board right to hire and fire necessary employees was not a Board request. It was initiated by Rep. Zook (R-Miles City) and then-Rep. Kadas (D-Missoula) on the interim Legislative Finance Committee. The bill was carried in the legislature by Rep. Zook and Sen. Van Valkenburg (D-Missoula). After significant discussion of the PER Board matter at every stage, HB169 was approved:

By the Legislative Finance Committee (only 2 dissenting votes).

By the House Appropriations Committee (unanimously).

By the House 67-33.

By the Senate on third reading by a unanimous voice vote.

The point that I make is this matter was a well thought out bill with strong bi-partisan support in both houses. Rep. Zook said, "without clear statutory authority, the PER Board's job is nearly impossible" and that he wouldn't take the job without the language in HB 169. It is necessary for the proper operation of the PER Board.

I want to also fill you in on a little history of my baptism by fire on being appointed to this board. I was appointed by Gov. Stan Stevens to the PER Board on April 1, 1992. Just 3 days after my appointment to the board, Bob Marks, the Director of the Department of Administration entered the office of our long time Administrator and fired him. He was told to clean out his desk, and leave, he was done. We were under the DOA control at that time, and the DOA hired and fired our Administrators. The board was never able to find out the reason for the firing. The only thing we did finally learn was that Administrator won a very healthy claim against the State of Montana, on a wrongful discharge claim, as the proper procedure had not been followed, to warrant a firing. This was a blow to the taxpayers of this state, and created devastation within our retirement organization. The morale of the 19 employees we had at the time was destroyed, and the trust really never was re-established until the board was able to hire Mike O'Connor in 1997. Prior to Rep. Zook's 1997 legislation, the board worked at following their fiduciary duties, and if the board disagreed with the DOA, the Administrator would not follow the direction of the board, as they could be fired by the DOA. That precise problem is what Rep. Zook alluded to in his statement that "without clear statutory authority, the PER Board's job is nearly impossible."

I would stress to this committee that there are very serious constitutional and policy issues here. A statutory change that makes impossible the Board's job of administering the retirement systems, should not be undertaken without a great deal of deliberate thought, both by you and legislative staff.