



**STATE OF HAWAII**  
**DEPARTMENT OF THE ATTORNEY GENERAL**  
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February 9, 2000

Ms. Koren Dreher  
Chair, Board of Trustees  
Employees' Retirement System  
of the State of Hawaii  
City Financial Tower  
201 Merchant Street, Suite 1400  
Honolulu, Hawaii 96813

Dear Ms. Dreher:

Re: Government Employees' Retirement Benefits --  
"High-3 Reform"

The previous Administrator of the Employees' Retirement System ("ERS") requested advice regarding the calculation of retirement benefits for current elected officials ("elective officers") and legislative officers as prescribed by Act 374, Session Laws of Hawaii 1997 (hereinafter referred to as "Act" or "Act 374"). The Administrator indicated that in order to expedite the advice on elective officers, the question on legislative officers can be addressed separately. We will therefore presently address the question only as it relates to elective officers.

I. ISSUE

How should retirement benefits of elective officers who were elective officers on July 1, 1997, be calculated pursuant to Act 374?

II. SHORT ANSWER

In our view, in general the calculation should be made thus: the law as it existed before the effective date of the Act is applied to service accrued before the effective date of the Act (i.e., elective officers can apply a high average final

compensation ("AFC") to years of possibly multiple types of services, including elective service) and the amount derived from that calculation is added to the amount arrived at by applying the Act to service accrued after the effective date of the Act (which is segregated by service category). This results in using different AFCs for pre- and post-Act service.

### III. FACTS

The calculation of retirement benefits is based upon a set percentage for each year of credited service multiplied by the member's average final compensation ("AFC"). AFC is the average salary earned during a member's three (or in some cases, five) highest paid years of credited service.

Before enactment of Act 374, if a member of the ERS were an elective officer, the member's retirement would be calculated as follows: (1) ERS will first determine the member's AFC for the member's entire service, then (2) multiply that AFC by the statutorily specified retirement allowance percentage for the type of service and by the number of years of a type of service. If the member had different types of service (elective and non-elective) with different retirement allowance percentages, the member's AFC would be multiplied by the years and percentages for each different type and those products would be added to determine the member's retirement allowance.

Elective officers received a retirement allowance of 3.5 percent multiplied by the years of elective service, while other public employees received allowances determined with percentages ranging from 1.25 percent to 2.5 percent. In addition, upon attaining ten years of credited service, an elective officer was eligible to receive retirement benefits regardless of the elective officer's age, while other employees had to meet a minimum age requirement before retiring.

In 1997, the legislature reacted to the perception that some of the benefits to elective officials should be reduced. As a result of Act 374, the calculation of retirement benefits was modified so that a separate AFC calculation must be made for each category of service -- elective officer, legislative officer, judge, and "other." Thus, after Act 374, a single AFC will not apply if an individual has more than one category of service.

The original purpose of enhanced benefits for elective officers and, in particular, legislators<sup>1</sup> was to recognize that in 1951, when elective officers first became eligible for membership in the retirement system, they earned \$1,500 a year. Thus, enhanced retirement benefits were established to attract to public service qualified individuals who might otherwise not have been willing to serve. Presently, legislators receive \$32,000 in salary, which is comparable to what many full-time public employees earn. The purpose of Act 374 is to eliminate one of the enhanced benefits of legislators, namely: the ability to obtain a high AFC from a non-legislative appointive job and use the high AFC, together with the 3.5 percent multiple, for all years of legislative service. The legislature noted that under the former computation method, an elective officer's benefits could increase substantially if the elective officer earned a higher salary in another governmental position. Thus, the legislature established a split formula to provide greater equity and fairness. Conference Committee Report No. 138 on H.B. No. 139, H.D. 2, S.D. 1, C.D. 1, Haw. H.J. 1093 (1997).

July 1, 1997, is the effective date of the Act. In addition, section 7 of the Act specifies two "non-impairment" dates. Section 7 of Act 374 provides:

This Act shall take effect on July 1, 1997;  
provided that with respect to:

- (1) Current elective officers and legislative officers as defined in section 1 of this Act, who are members of the employees' retirement system, the member's benefits accrued up to November 3, 1998, shall not be diminished or impaired; and
- (2) Other individuals who are members of the employees' retirement system and who accrued benefits as elective officers or legislative officers as defined in section 1 of this Act, before July 1, 1997, the member's benefits accrued up to June 30, 1997, shall not be diminished or impaired.

In other words, (A) the non-impairment date for elective officers who were in office on the effective date is November 3, 1998 (the 1998 general election day); and (B) the non-impairment date is June 30, 1997, for persons who on July 1, 1997, were not

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<sup>1</sup>We note that in addition to legislators, elective officers also include, e.g., the governor and lieutenant governor, and the mayors of the counties.

elective officers but who had past service as an elective officer.

#### IV. DISCUSSION

##### A. Statutory Construction

"[R]emedial statutes . . . include statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state." 3 Norman J. Singer, Sutherland Statutory Construction § 60.02 (5th ed. 1992)(footnote omitted). "[R]emedial legislation is to be construed liberally in order to accomplish the purpose for which it was enacted." Roe v. Doe, 59 Haw. 259, 581 P.2d 310, 315 (1978). "A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 Norman J. Singer, Sutherland Statutory Construction § 60.01 (5th ed. 1992)(footnote omitted). If the drafters of a remedial statute did not consider specific situations, an act should be interpreted "consonant with the probable intent of the drafters." In re Registrant E.D., 672 A.2d 183, 185 (N.J. Super. Ct. App. Div. 1996). The interpreter should not rely on formal rules of interpretation but, rather, "should rely on the breadth of the objectives of the [statute] and the common sense of the situation, in order to further the legislative purpose." Id. Exceptions to remedial statutes should be construed narrowly, but such exceptions should also be construed sensibly, giving effect to the statutory purpose. Medler v. United States Bureau of Reclamation, 616 F.2d 450 (9th Cir. 1980).

##### B. The Act

Section 2 of the Act amended section 88-74, Hawaii Revised Statutes, to add a new paragraph (4), which provides in pertinent part as follows<sup>2</sup>:

**§88-74 Allowance on service retirement.** Upon retirement from service, a member shall receive a retirement allowance as follows:

. . . .

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<sup>2</sup>The language quoted is as of 1997. The amendments to this section made by Act 65, Session Laws of Hawaii 1999, are not relevant to this discussion, and hence are not included.

- (4) If the member has credited service as an elective officer or as a legislative officer, the member's retirement allowance shall be derived by adding the allowances computed separately under subparagraphs (A), (B), (C), and (D) as follows:
  - (A) . . . [F]or each year of credited service as an elective officer, three and one-half per cent of the member's average final compensation as computed under section 88-81(d)(1) . . . ; and
  - (B) . . . [F]or each year of credited service as a legislative officer, three and one-half per cent of the member's average final compensation as computed under section 88-81(d)(2) . . . ;
  - (C) . . . [F]or each year of credited service as a judge, three and one-half per cent of the member's average final compensation as computed under section 88-81(d)(3) . . . ; and
  - (D) For each year of credited service not included in subparagraph (A), (B), or (C), the average final compensation as computed under section 88-81(d)(4) shall be multiplied by two per cent, two and one-half per cent, or one and one-quarter per cent, as applicable to the credited service earned as a class A, B, or C member, respectively.

Thus, the express language of section 8-74 provides that the elective officer's retirement allowance shall be computed separately under subparagraphs (A), (B), (C), and (D) for service as an elective officer, legislative officer, judge, and other service, respectively.

Section 4 of the Act amended section 88-81, Hawaii Revised Statutes, which provides for the calculation of AFC. Section 88-81 provides in pertinent part as follows:

**§88-81 Average final compensation.** (a) Average final compensation is (1) for employees who have become members prior to January 1, 1971, the average annual compensation pay or salary . . . (A) during the member's five highest paid years of credited service, (B) at the option of the member, during the member's three highest paid years of credited service . . . ; or (2) for employees who become [members] on or after January 1, 1971, the average annual compensation pay or salary . . . (A) during the member's three highest paid years of credited service . . . .  
. . . .

(d) If a member has credited service rendered as an elective officer or as a legislative officer, the member's average final compensation shall be computed separately for each category of service as follows:

- (1) For the three highest paid years of credited service as an elective officer . . . ;
- (2) For the three highest paid years of credited service as a legislative officer . . . ;
- (3) For the three highest paid years of credited service as a judge . . . ; and
- (4) For the three highest paid years of credited service not included in paragraph (1), (2), or (3) . . . .

Thus, the express language of section 88-81 provides for separate calculations of AFC for the three highest paid years of credited service in each of the following four categories: elective officer, legislative officer, judge, and other service.

The previous Administrator's request relates to current elective officers; thus, paragraph (1) of section 7 of the Act is applicable. Section 7 of the Act provides for the effective date and non-impairment dates of the amendments. It provides in pertinent part as follows:

This Act shall take effect on July 1, 1997;  
provided that with respect to:

- (1) Current elective officers and legislative officers as defined in section 1 of this Act, who are members of the employees' retirement system, the member's benefits accrued up to November 3, 1998, shall not be diminished or impaired . . . .

The non-impairment date was set to coincide with the next scheduled general election.

### C. Analysis

The general rule under the Act after its effective date is that AFC is calculated separately for each category of service. After the AFC is determined for that category, it is multiplied by the number of years of credited service in that category times the appropriate multiplier (1.25%, 2.0%, 2.5% or 3.5%). Then,

the subtotals for each category of service are added to arrive at the total retirement benefit. The general rule applies to individuals who become elective officers, for the first time, after the effective date of the Act. For those individuals who are elective officers on the effective date of the Act, there will be calculations relating to post-Act service and calculations relating to pre-Act service (if they have changed their category of service in the past).

After the effective date of the Act, all employees will have their different categories of service calculated separately. To apply that rule retroactively would ignore the effective date of the Act and raise impairment problems. The current application that requires two sets of calculations -- one pre-enactment and one (or more) post-enactment is intended to make sure that the accrued increased benefits are not impaired.

In our view, however, the separate pre- and post-Act calculations are not necessary for an individual who remains an elective official, i.e., legislator, governor, lieutenant governor, or mayor, throughout the individual's public career (even though the individual may change from representative to senator to governor over the course of the career) because this individual has not engaged in the activity sought to be remedied by Act 374, namely, switching from a relatively low-paying elective position to a higher paying appointed position and applying the larger percentage to the AFC (high 3) for all years of service.

For an individual who crossed over from an elective position to a higher paying executive branch appointive position before the effective date of the Act, July 1, 1997, the calculation of that individual's retirement benefit must be bifurcated. The bifurcated calculation will allow the Act to be effectuated without impairing the elective officer's accrued benefits. For service prior to July 1, 1997, the calculation will be based on the higher AFC for calculation of both the elective and executive components of the retirement benefits to avoid an impairment problem. For service after July 1, 1997, the Act applies, i.e., AFC is calculated separately for each category of service.

We provide the following four scenarios to explain the application of the Act.

Application 1:

**Example A:**

Service up to November 3, 1998:

- \* 20 years as a legislator at \$32,000

Service after November 3, 1998:

- \* 10 years as a legislator at \$36,000

Calculation

Elective: 30 yrs x 3.5% x \$36,000 = \$37,800<sup>3</sup>

Under prior law, AFC for elective officers was the average of the three highest paid years of service for the total years of service. Under example A, above, AFC is based on the total years of state service in a single category and the non-impairment dates are not applied. The rationale for this application is that the application of the non-impairment date is unnecessary because the individual has not changed the category of service. Further, if the new language is applied, there will be an "impairment." Finally, the purpose of the statute, to prevent an elective officer crossing over to a higher paying executive branch appointive position and thereby substantially increasing that individuals' retirement benefits, does not apply since the individual has stayed in elective service during the individual's entire public service.

**Example B:**

Service up to November 3, 1998:

- \* 20 years as a legislator at \$32,000
- \* 4 years as governor at \$94,780

Service after November 3, 1998:

- \* 4 years as governor at \$94,780

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<sup>3</sup>Amount would be limited to \$27,000, or 75 percent of applicable AFC(s). In no case for class A and class B members may retirement benefits exceed 75 percent of AFC. Section 88-74, Hawaii Revised Statutes.



Calculation

Elective: 28 yrs x 3.5% x \$94,780 = \$92,884.40<sup>4</sup>

Application 1, Example B, addresses the individual who stays an elective officer during the individual's entire public career although the individual goes from a lower-paying legislative position to a higher-paying position such as a governor, lieutenant governor, or mayor. Though that individual's AFC is dramatically increased, the individual nonetheless remains an "elective officer" during the individual's entire career.

Application 2:

Service prior to July 1, 1997:

- \* 10 years as a legislator at \$32,000, **followed by**
- \* 5 years as an executive branch appointee at \$60,000

Service after July 1, 1997:

- \* 12 years as legislator at \$36,000

Calculation

Service prior to July 1, 1997:

Elective: 10 yrs x 3.5% x \$60,000 = \$21,000  
General Employee: 5 yrs x 2% x \$60,000 = 6,000

Subtotal: \$27,000

Service after July 1, 1997:

Elective: 12 yrs x 3.5% x \$36,000 = \$15,120

Total: \$42,120

Under Application 2, though the thrust of the Act was to do away with crossover abuse, because of the non-impairment clause in section 7 of the Act, we believe this individual is allowed to keep the individual's right to the crossover calculation for service credit accrued prior to July 1, 1997. This application

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<sup>4</sup>But limited to \$71,085, or 75 percent of applicable AFC.

ensures that the individual's accrued benefits are not impaired. Application 2 gives force and effect to section 7(2), but only for the years of actual crossover prior to the non-impairment date.

Application 3:

Service prior to November 3, 1998:

\* 12 years as a legislator at \$32,000

Service after November 3, 1998:

\* 8 years as a legislator at \$36,000

\* 4 years executive branch appointee at \$60,000

Calculation

Service prior to November 3, 1998:

Elective: 12 yrs x 3.5% x \$36,000 = \$15,120

Service after November 3, 1998:

Elective: 8 yrs x 3.5% x \$36,000 = 10,080

General Employee: 4 yrs x 2% x 60,000 = 4,800

Total: \$30,000

Under Application 3, the single category calculation is allowed (as in Example A above), but only so long as the individual is an elective officer. When the individual becomes an appointed official, a new calculation is made.

By the Act's express terms, the benefits of current elective officers accrued up to November 3, 1998, the non-impairment date, shall not be diminished. The foregoing applications comply with the Act's terms and with section 2 of article XVI of the Hawaii Constitution, operate prospectively, and do not diminish the benefits of current elective officers. Conference Committee Report No. 138 on H.B. No. 139, H.D. 2, S.D. 1, C.D. 1, Haw. H.J. 1093, 1094 (1997), as follows:

Article XVI, section 2, also prohibits the reduction of benefits attributable to past service of public employees. However, it does not limit the Legislature in changing the calculation of benefits of:

- (1) New entrants into the Employees' Retirement System; or
- (2) Persons already in the system with regard to their future service.

The legislative history of article XVI, section 2, states:

. . . the section would not limit the legislature in making general changes in a system, applicable to past members, so long as the changes did not necessarily reduce the benefits attributable to past services. (Committee of the Whole Report No. 18, section 13, Proceedings of the Constitutional Convention of Hawaii, volume 1, page 330 (1950))

Section 2 of article XVI of the Hawaii Constitution, provides that accrued retirement benefits shall not be diminished or impaired. Thus, the legislature may change the law to affect benefits that are attributable to future service, but it may not change the law to diminish or impair benefits that are attributable to past service.

In our view, the retirement benefits of elective officers who retire between July 1, 1997, and November 3, 1998, should be calculated according to the calculation as provided by the applicable provisions of chapter 88 in effect on June 30, 1997. This interpretation follows the legislative intent. Stand. Comm. Rep. No. 1223 on H.B. No. 139, Haw. S.J. 1361-1362 (1997) provides:

[Y]our Committees have provided that the new benefit calculation will take effect when the current term of office of an elective officer expires (the general election date of 1998 or 2000, as the case may be). It is the intent of your Committees that the general election effective date shall apply even if an elective officer resigns from office prior to that general election date to maintain uniformity.<sup>5</sup>

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<sup>5</sup>The year 2000, mentioned in the Standing committee Report, was deleted from H.B. No. 139 before it was ultimately enacted.

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In sum, the general rule under Act 372 is that the ERS must bifurcate the calculation for pre- and post- Act service and define and calculate AFC for each category of service in order to calculate the retirement benefit. However, this general rule should not apply to an individual who, on July 1, 1997, and November 3, 1998, was an elective officer and remains in that category throughout the individual's entire public service.

The purpose of outlining these applications is to show how the non-impairment provisions work regarding benefits of those who had crossed over from an elective position to a higher paying executive branch appointive position. These applications are not to be used automatically, but on a case-by-case basis for the purpose of not impairing retirement benefits. Thus, if applying the non-impairment dates results in an impairment, the dates should not be applied. Finally, the foregoing applications are based upon the language and objectives of Act 374 and further the Act's legislative purpose.

Very truly yours,  
Diane Erickson  
Deputy Attorney General

APPROVED:  
Earl I. Anzai  
Attorney General