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Thomas J. Perona
Chair, Fort Pierce Retirement Board
City of Fort Pierce
100 North U.S. Highway One
Fort Pierce, FL 34950

RE: **REPORT ON NATIONAL ASSOCIATION OF PUBLIC PENSION ATTORNEYS (NAPPA) 2017 LEGAL EDUCATION CONFERENCE**

Dear Mr. Perona:

This letter serves to thank both you and, through you, the other members our Retirement Board for continued authorization of my attendance at the Annual Education Conference of the National Association of Public Pension Attorneys (NAPPA). Such attendance is found to be of considerable value through the knowledge thus acquired and it seems proper that my appreciation in this regard be best expressed by offering our Board a summary report of what was covered in this year's conference, which took place from June 27, 2017 through June 30, 2017. There is in mind a comment once made by Lewis L'Amour who said "knowledge is like money: to be of value it must circulate, and in circulating it can increase in quantity and, hopefully, in value." Selfishly I find that the effort taken to present these reports is personally rewarding where it has the effect of reinforcing my own awareness of what was covered, in line with a traditional proverb which holds that "in teaching others we teach ourselves." Moreover, the conference served as useful opportunity to rub shoulders with professional peers whose knowledge and experience is held in great respect and I was able to chat informally about a number of legal matters that arose in recent months. It is of course impossible to summarize everything that was covered – in hard copy form, the conference materials would probably include 1,000 pages or more. Moreover, a number of "breakout" sessions were presented concurrently, sometimes presenting difficult choices about which one to go to. But the entire record is found with a memory stick which is copied and made available to each one of our Board Members, who are encouraged to view it when time allows. I am happy to entertain any questions and if unable to respond directly will provide an answer from such other sources as might be appropriate.

The conference began in normal fashion on a Tuesday, devoted to a summary of basic principles. That day's sessions are aimed primarily at new members but are nevertheless valuable in reinforcing awareness of fundamental provisions effecting public pension plans. Apart from

Chapter 112 and our own Code of Ordinances, the speakers pointed out the essential federal laws effecting governmental plans: the U.S. Constitution, Art. I, §10 ("No state shall pass any ....law impairing the obligations of contracts"); the Internal Revenue Code; the Uniformed Services of Employment and Reemployment Rights Act (USERRA); Art II of the Employee Retirement Income Security Act of 1974 (ERISA); and the Age Discrimination in Employment Act (ADEA). We know that "governmental" plans, defined at 29 USC Section 1002(32), unlike private plans, are exempt from many provision of ERISA, including Title I (Fiduciary Duties, reporting and disclosures requirements) and Title IV (Plan Termination Insurance). See 29USC §1003(b)(1) and 29USC SEC. 1321(b). Likewise many IRC provisions do not apply to governmental plans, such as IRC 401(a)(13). The second session of the day (see outline of Brian Goodman, Legal Affairs and Compliance Coordinator for Virginia Retirement System) covered the same material in somewhat greater detail. The discussion there of QDROs was particularly interesting. Comments there about provision for child support and spousal division of pension benefits as exceptions to anti-alienation provisions appear very much consistent with the Board's rules governing QDROs (see Board Rule 16). There was an introductory discussion about public pension investments (see outline by Cynthia Collins). It pointed out that public pension plans invest over $3 trillion in various investment classes. As we know, those are either public market investments including fixed income bonds and securities, domestic equities and international equities. There are also alternative investments including private equities/venture capital, hedge funds, opportunistic funds, real estate's funds, commodities and infrastructure funds. As Board members are aware, our only "alternative" investment at the present time involves a real estate fund with Heilman. Newer Board members may find the outlines overview of the investment process helpful. According to some of the most recent historic data, U.S. public pension fund assets are allocated as follows: 52.2% to equities; 26.7% to fixed income; 19.4% to alternative investment vehicles; and a nominal amount held in cash reserves. These are the major legal issues for fund counsel to be looking at when reviewing investment agreements: sovereign immunities/governmental immunity; indemnification prohibition/limitations; standard of care – fiduciary duty; power of attorney; designated jurisdiction for disputes; governing law; arbitration; public disclosure laws and fund information; termination rights and key man provisions; placement agent policies; divestment and prohibited investments; and tax-related provisions.

Another outline covered on the first day was entitled "Fiduciary Duty – what do you and your board members need to know?". It covered the basic frame work for fiduciary decision making including the duty of loyalty, duty of care and duty of impartiality. CALPERS distilled these various duties into an 8-questions matrix which it suggests that all board members ask themselves when called upon to make decisions:

1. Do the agenda materials provide all of the information necessary for a proper understanding of the issues so that we can make a sound, informed decision?

2. Have all of the potential benefits and risks resulting from this decision been appropriately identified and analyzed?

3. Have all viable alternatives to this proposal been identified and analyzed??

4. Are staff and the outside expert (where applicable) in agreement on the recommended course of action?

5. Were any questions that we had before and during this discussion of the items sufficiently addressed?

6. Do I have any actual or potential conflicts of interest?

7. Is my intended decision in the best interest of the systems members, beneficiaries and retirees as a whole, without regard to the interest of any constituents or appointing power?

8. Will the results of the board's decision favor the interest of one group of the systems members, beneficiaries or retirees over those of another group?

Another outline was entitled "Are you qualified? Protecting the system's qualified status and providing the best tax treatment for member's benefits". Here it was pointed out that protection of a system's qualified tax status is essential for these reasons: employer contributions are not taxable to members; earrings/income are not taxable to the trust or members; favorable tax treatments may be available to members upon plan distributions; employer/members do not pay employment taxes when employer contributions are made or benefits are paid; tax recapture is available for qualified plans and tax treaty entities.

Every year typically sees one big "take away" subject at the conference. This year's major "take away" news included news of developments involving the IRC's determination letter program. It will be recalled that until 2015, a plan had the ability to ask for a formal "determination letter" from the IRS confirming a plans compliance with all tax requirements. But that option was then foreclosed by IRC Announcement 2015-19 which provided for elimination of all 5-year remedial cycles effective 1/1/17. Now, pursuant to Revenue Procedure 2016-37, eff. 1/1/17, applications for determination letters are accepted only for initial plan qualification, plan termination or other circumstances as determined by the IRS. The IRS will be publishing annually a "requirement amendments list and operational compliance list". Plans will thus be able to determine for themselves, according to the most recent updated annual release, whether they are in compliance or not. That's certainly good to know and we ourselves may wish to make it an annual practice to review that announcement so as to assure continuing conformity with all applicable tax provisions. The outline also pointed out that a governmental employer may pick up employee contributions, treating them as pre-tax employer contributions. See Code Section 414(h)(2). This is broadly implemented in Revenue Ruling 2006-43 which discusses employer paying contributions in lieu of the employee, providing that the employee has no option of receiving picked-up amounts, providing for official action, timing of the pick-up and irrevocable elections. An important element of plan qualification involves compliance with the IRC's

exclusive benefit rule". See Rule 401(a)(2). Such Rule provides that the plan must be established and operated for the exclusive benefit of employees and their beneficiaries and the plan must make it impossible, as to any time prior to satisfaction of all liabilities with respect to employees and their beneficiaries, for any of the investment corpus or income to be used for or diverted to purposes other than the exclusive benefit of the employees and their beneficiaries. Application of the Exclusive Benefit Rule arises in these situations: payment other than to members and their survivors; investments not meeting fiduciary standards; diversion of assets; return of contributions to the employers; QDROs and garnishment. Governmental plans must provide for vesting. See IRC Code SEC. 401(1)(7). There must be 100% vesting if there is partial or complete termination of the plan or complete discontinuance of contributions. Contribution limits are spelled out at IRC Code Sec. 415(c).

Benefit limitations are controlled by IRC Code Section 415(b). The current maximum benefit payment from a defined benefit plan, readjusted each year, is $215,000.00 for 2017. Benefit receipt is tested as a straight life annuity. Benefits on service purchase are spelled out in IRC Code Sec. 415(a). It involved consideration of after-tax employee contributions for permissive service credits. The maximum compensation that may be considered in determining benefits is $270,000.00, for 2017. See IRC Code Sec. 401(a)(17). Certain employees are grandfathered from this provision. Benefit payments are subject to Code Section 401(a)(9) which sets out the IRC's distribution requirements and contains statements that the plan will comply with those requirements. Benefits must be distributed or begin to be distributed by a required beginning date and may be distributed either over the life of the employee, or over the lives of such employee and a designated beneficiary, or over a period not extending beyond life expectancy(ies). Section 401(a)(9) addresses areas of inquiry involving required benefit payments, including commencement of benefits by a requested beginning date; requirement that a minimum distribution is made; requiring tracking down participants and beneficiaries endorsement accounts; testing of surviving benefits under the incidental benefit rules; and providing for grandfather provisions and/or good faith, reasonable compliance. Rollovers are covered by Sec. 401(a)(31) and identify eligible rollover distributions, eligible retirement plans, using rollovers for service purchases, maintain limitations on in-service distributions, providing for compliance notice for requirements, discussion of after-tax dollars, implementing a non-spousal beneficiary rollover, implementing ROTH Rollovers and rollovers of lump-sum distributions from DC plans to DB plans where amounts are converted to immediate annuities.

Another good outline covered on the first day is entitled "Fiduciary Duties and Considerations Regarding Recent Lawsuits Against Retirement Plans" (by Robert Gauss). This sets out fiduciary duties and obligations in somewhat greater detail than some of the other presentations. But especially interesting was its discussion of certain enforcement actions that the Securities Exchange Commission (SEC) has begun pursuing against investment advisors. These other involve the "pay to play" rule which prohibits investment advisors from providing advisory services for compensation, for at least two years following any political contribution made to a public official or candidate who would be in a position to influence the selection or retention of advisors to manage public pension funds. See Sec. Rule 206(4)-5 (2010). The outline covered a large body of case law concerning litigation arising out of advisor fees, both as between a fund and its advisors, as well as member

plaintiffs against their plan. As to those suits, judicial focus is on process, not best possible result. That is, there is judicial testing of board conduct in light of the fiduciary rule of prudence, how the fiduciaries acted in their selection of investments and not whether those investments succeeded or failed. Universities, especially, have been the target of suits challenging their investments. The outline contained a range of defenses often raised by these Universities through motion to dismiss when responding to the complaints. Boards may seek to limit their exposure to such claims by establishing investment committees and delegating responsibility to such committees for evaluating and monitoring vendors and investment options, adopting investment policy statements and hiring investment advisors. Such investment committees are typically given final authority with a reporting function to the Board. Boards may also consider hiring an investment advisor or consultant – we ourselves do this of course through Callan & Associates. The outline strongly recommends ongoing review to monitor vendors and investment options and such a review process, fortunately, is well established through our own Board's practices.

Among the first day materials is found a "Glossary of Frequently-Used Actuarial Terms". It was compiled by Michael Moquin, Chief General Counsel for the Municipal Employees System of Michigan from various actuarial sources. Among the provisions is a term we see often, "Actuarial Funded Ratio". The glossary definition of the term includes this: "the ratio between a pension plans Actuarial Value of Assets (AVA) and Actuarial Accrued Liabilities (AAL), the common measure of a plans relative financial health. Most pension plans are considered fiscally sound if their funded ratio is 80%. Full funding (100%) is not expected by most pension analysts because benefits are paid out over an employee's lifetime, so that prospect of a run on a pension fund is illogical given the long-term nature of governments." Compare that definition with our own funds 89% funding level as reported to us by Brad Armstrong in his report of 9/30/16. Review of the other definitional terms as set out in the glossary is suggested for anyone wishing to quickly acquire a good basic understanding of pension terminology.

Another outline was entitled "Deal Terms and Key Considerations for Private Investment Funds". Anytime the Board is asked to enter into a relationship with a private investment fund, as we have done with Heilman, there is a lengthy, arcane thicket of contractual terms which must be reviewed and entered into with the fund manager. Here, the outline is helpful in providing a matrix of points to be considering. However, as a practical matter, "small" funds, such as ours, have little room or scope for negotiation. This is a luxury mostly enjoyed by large, statewide funds having many billions of dollars at their disposal. Still, these are things one must be aware of so that pitfalls may be avoided.

The second day of the conference began with a presentation entitled "Breaking Bad – How to Maintain Your Ethical Core". There was much discussion of ABA model Rule 1.13 (organization as client). Counsel may be confronted with ethical conundrums regarding his or her duty to the organization as a whole, the Board, individual members of the Board, administrators and so forth. There must thus be a clear understanding of exactly who the client really is. The fundamental bedrock rule is that the lawyer "...represents the organization acting through its duly authorized constituents." See Model Rule 1.13(a). See also ex. Model Rule 1.2 (scope of representation and allocation of authority between client

and lawyer); Model Rule 1.16 (declining or terminating representation); Rule 1.6 (confidentially); Rule 1.17(a) conflict of interest). Such ethical considerations acquire pension-relevance in matters involving adjudicatory proceedings, disability reviews/recommendations, intergovernmental communications, business activity and internal investigations. Here's an example of how such ethical considerations were recently applied: from time to time an employee may want to contest an award of benefits./ In such an instances, our City Attorney formally represents the City while the employee is represented by private counsel. I myself remain at the sideline as counsel to the Board and avoid taking any position either for or against either side, so as to avoid any conflict of interest.

Another second day session of interest was entitled "Varying State Prospects on the Defined Benefit Pension Protections". This set out a very broad legal frame work for analyzing public pensions. The discussion there included Florida's own ***Scott v. Williams***, 107 So.3d 379 (Fla. 2013) wherein the Supreme Court sanctioned a legislative initiative to convert the Teacher's Retirement System from non-contributory to a contributory retirement system. The Court determined that the legislature was permitted to make prospective changes, even where fundamental in character. Another important case discussed in the outline was the holding from the United States Supreme Court in ***U.S. Trust Co. of New York v. New Jersey,*** 431 U.S. 1 (1977) which spelled out a 3-part test for determining whether there is unconstitutional abridgement of contract rights: (1) is there a contract; if so, was such contract substantially impaired; and if so, was the impairment reasonable and necessary to serve a legitimate public purpose?

Another presentation was entitled "Complex Real Estate Investing". In the event our Board ever moves deeper into the field of alternative investments this outline is a good starting point to become educated on the subject matter.

Of interest was a presentation titled "What every Pension Fund Lawyer should know about the Art, Science, and Law of setting actuarial assumptions". It must acknowledged that one's eyes often glaze over when this subject comes up at conferences. Still, there must be familiarity with the subject, at least in broad context. There is, for instance, the basic actuarial formula: C (contributions) + I (investment income) = B (Benefit Payments) + E (Expenses). Underlying that simple formula are the actuarial assumptions that are made involving assignment of valuation to the promised benefits, identifying economic assumptions including the expected investment return rate, as well as demographic assumptions including mortality/longevity. Those assumptions need to be reexamined every 3 to 5 years. Currently the general consensus is that future investment returns will be lower. CALPERS, for example, recently reduced its expectations for future returns from 7.50% to 7.00%. There is a continuing trend for longer life expectancy and we saw that in last year's legislative mandate regarding adoption of a new mortality table. And in today's economic environment, Boards are generally inclined to adopt more conservative (higher cost) assumptions. The outline includes a listing of pension actuarial organizations, a listing of actuarial governmental documentation and sources for actuarial standards of practice (ASOPs).

There is a detailed outline entitled "IRS's Curtailment of Determination Letter Program: Assessing the Impact for Government Plans". Anyone wishing to understand the determination letter process is encouraged to read that outline. Particular attention should be given to Rev. Proc. 2016-51 which makes several changes designed to accommodate changes made by the IRS to the determination letter process by Rev. Proc. 2016-37. These involve the Employee Plans Compliance Resolution System ("EPCRS"). When a plan comes out of compliance then, for all but the most egregious circumstances, IRS will permit the plan sponsor to restore the plan to qualified status with full retroactive effect through either the Voluntary Compliance Program ("VCP") or the Audit Closing Agreement Program ("ACAP"). Those are components of EPCRS. The EPCRS and its related plans are discussed in considerable detail here and are to be reviewed should any compliance issue arise. In the event plan document failures are discovered in an examination, then the audit cap comes into plan and provides for correction with the payment of a "modest sanction", typically paid by the plans sponsor and not the plan itself. Note that Rev. Proc. 2017-4 forecloses use of attorney opinion letters as a viable alternative to determination letters (stating "The Employee Plans Ruling and Agreements" office ordinary will not issue letter rulings on matters involving plan qualified status under Sections 401 through 420 ....Employee Plans Rulings and Agreement does not issue letter rulings on the matter involving the Federal tax consequences of any proposed federal, state, local, municipal or foreign litigation").

Of great interest was a second day outline entitled "Does size matter? Pension System Governance as a Function of Size and Structure". This included some intriguing background information. For instance, we are advised that there are roughly 4,000 public sector retirement systems in the U.S. Of those, 3,771 are locally-administered plans and 227 are State-administered. Collectively, these funds hold 3.86 trillion dollars in assets, serve 9.9 million retirees and distribute 266.1 billion dollars a year in benefits. The largest governmental system, CALPERS, has assets amounting to 302 billion dollars, compared to Florida's Retirement system, at 148 billion dollars (this has the humbling effect of putting our own 175 million dollars system in perspective). The best funded plan is South Dakota at 104%, and our FRS is the 5th best funded, at 92%. The worst funded plan is the Kentucky Retirement System, at 37.4%. According to the outline, asset size is not a factor in funding status. In the aggregate, according to a bar graph, state funding levels average somewhere around 74% whereas for municipal plans in the aggregate the funding ratio is approximately 58%, a figure which certainly makes Fort Pierce shine by comparison. Features typically held in common by well-funded pension systems include the following: full contributions of ARC (mandated by law in Florida); employee contributions with which to share in the cost of plans, benefit improvements such as the multiplier, which are actuarially valued before adoption and which are properly funded upon adoption; COLAs which are granted responsibly and on an ad hoc basis; anti-spiking measures that ensure actuarial integrity and transparency; and reasonable actuarial assumptions. Our own plan in understood to incorporate all of these elements.

The third day of the conference began with another ethics session, "Ethical Issues Raised in Negotiations with Counsel for a General Partner". Such presentation focused on the laws of New York, California, Delaware, Illinois and Texas. This may be of value when we again negotiate with a fund manager.

Unfortunately, many pension funds encounter difficulty when their sponsors run into trouble, thus confronting trustees with difficulty fiduciary issues as they attempt to reconcile a balance between diminishing sponsorship contributions against actuarial soundness. The outline on that is entitled "Funding Gaps and Fiduciary Duties: Should we Kill the Goose or collect Smaller Eggs?". Discussed are techniques to alleviate plan sponsor distress, case studies, strategies for response when plan sponsors fail to pay their contributions, assessment of interest and penalties, intercepting appropriations, suspension and reduction of benefits and so forth. Fortunately, not a lot of attention is required by our Trustees to this subject.

Of interest was a presentation entitled "Meet the New Boss. Same as the Old Boss?/What a New Administration Means for the SEC's Agenda and Enforcement". There is a new SEC Chair, Jay Clayton whose agenda seems to be rolling back Dodd-Frank and possibly targeting the Volcker Rule, the DOL Fiduciary Rule, and Private Fund Manager Registration. Under Dodd-Frank there was required registration of private fund managers and increased market surveillance. The SEC examination program under such Act exposed conflicts of interest, material omissions and disclosures and governance failures, and launched high profile cases driving improved disclosure and increased transparency. It will probably be another year or so before the effects of a new incoming administration on that landscape become clear. In any case, private fund managers remain subject to Section 206 Fiduciary duties as set out in the Advisors Act.

One presentation was entitled "Protecting Fund Assets Through Shareholder Litigation". For the Board this subject typically arises when our system receives notice of a class action being pursued in connection with securities litigation. At that point the Board has a fiduciary duty to consider whether it should participate or opt out. It may not be an easy decision. The Board will have to consider whether its own situation is materially different from what is represented by the class, the size of the prospective loss and opportunity for increased recovery either within or without the class, broader claims (timing of purchases, securities, facts), loss or retention of litigation strategy, unjustifiably low settlement or high attorney's fees, faster distribution of funds, or undue class certification delay, and a funds past experience with class recoveries. There is included within the outline considerable background information on the class litigation claims process.

The last day of the conference, on Friday, usually begins as it did this year with a Federal Legislative Update. It's given by an excellent speaker, Leigh Snell, Director of Federal Relations for the National Council on Teacher Retirement (NCTR). Our Board Members are encouraged to review that outline at first hand. It identifies a number of challenges presented to public pensions by the new administration, including possible repeal of Dodd-Frank, infrastructure measures, regulatory fees (and an associated "vote two for one"), and tax reform. All of that is generating more than the usual uncertainty regarding pension-related legislation. Mr. Snell predicts that efforts to repeal Dodd-Frank will probably fail. There is a

house bill pending but it is thought unlikely that anything of the sort will get through the Senate. Talk about infrastructure work is probably more rhetorical than substantive for the very practical reason that the greatest need for it is in the urban (i.e. "blue") areas . One major area of unfinished governmental business, that looks as if it will remain unfinished for another year, involves tying down a definition of "governmental plans". That's important of course since governmental plans are exempt from reporting, participation, vesting and fiduciary standards of ERISA. They are also exempt from premium assessment by the Pension Benefit Guaranty Corp. While many entities could be affected depending upon the final shape of the definition when it finally does comes out, fortunately that appears to be only an academic issue so far as the City of Fort Pierce is considered. One way or the other it may fairly be presumed we would always be covered by any such definition. The possibility of "tax form" remains a dangerous prospect for pension funds. To understand why that is so, consider that allowable deductions, exemptions, deferrals and credits under the tax code currently reduce federal income tax revenue by over 1.2 trillion dollars and also reduce payroll taxes and other revenue by an additional 128 billion dollars. From 2016 to 2025, retirement security incentives built into the tax code will amount to 2.1 trillion dollars. Of those incentives, roughly 2/3 of the total benefit goes to 20% of tax payers with the highest income, which the bottom 20% of the households receive just 2% of the benefits of those retirement tax incentives. Law makers thus have a strong incentive to look closely at the traditional tax benefits under pension plans. Possible tax reform threats for public pensions include provision for mandatory social security and unrelated business income tax to apply to public pensions, a repeal of employer pick up and The Secure Annuities for Employee (SAVE) Retirement Act which would create a DB pension plan, "annuity accumulation retirement plan". There is also PEPTA (Public Employment Pension Transparency Act) which has been introduced by Congressman Nunes in every congress since 2010, but that does not appear to be going anywhere. He notes that public pension opponents seem to be "stepping up" their efforts, and there is a new website out there, pensionsecurity.org, developed by the Laura and John Arnold Foundation created for the ostensible purpose of helping jurisdictions to "assess the true magnitude of the pension problems and analyze structural reforms that would protect workers and tax payers". Two familiar players on the scene, The American Legislative Exchange Council, (ALEC) and the Heritage Foundation have created a new "partnership" in the form of a "Pension Reform Working Group". The stated goal there is to "develop free market solutions to assess the pension crisis at all levels of government". Currently the Arnold Foundation has issued a "request for letters of interest" seeking proposals for grant applications from "organizations wishing to conduct research projects focused on public retirement policy". Mr. Snell ended his presentation by noting that very little happened in Congress this past year and the pendency of the general election had much to do with that.

The legislative presentation was followed by a summary of significant pension-related state decisions. None of those cases involved any decisions not heretofore discussed at length with our Board and no effort is made here to cover them, They involve unique factual scenarios and laws which may or may not resemble the statutes and code provisions we are subject to here in Fort Pierce. However, such decisions may be usefully consulted on specific litigation issues which may arise hereafter, as possible guidance on how a Florida Court might rule on questions of first impression.

A final conference presentation was entitled "Life's a Breach (Cyber Threat Planning and Preparation". It recommended creation of a plan for response to cyber-attacks, with procedures for incident reporting, investigation and resumption of activity. There was also recommendation for identification and securing of logistical requirements, threat awareness and training, investigation, effective coordination and team communication, incident tailored implementation and recovery. While this is a subject that does not directly implicate our system, since all IT services are provided through the City of Fort Pierce and its IT department. It is felt that the Board may wish to exercise fiduciary responsibilities by inviting one or more IT people for a briefing on what "cyber incident response plan", if any, might be in place so as to protect our systems data.

The foregoing is intended as a summary overview of highlights from NAPPA's annual educational conference. As noted before, no effort is made to touch on everything given the extended scope of the subject matter, much of which relates to differing needs of larger plans and foreign jurisdictions. Attempt has been made to comment on those aspects of the material though to be of greatest interest and once again, there is offered thanks for the opportunity to participate in this most educational of conferences.

I am and shall continue to remain, as always

Most cordially and respectfully yours,

JAMES T. WALKER, ESQUIRE
JTW/la