



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 5

TO: MEMBERS OF THE SPECIAL COMMITTEE ON STATE-TRIBAL RELATIONS

FROM: David L. Lovell, Senior Analyst

RE: Participation of Tribal Law Enforcement Officers in the Wisconsin Retirement System:
Issues and Options

DATE: April 13, 2005

At its February 25, 2005 meeting at Oneida, Wisconsin, the Special Committee on State-Tribal Relations heard presentations regarding the Wisconsin Retirement System (WRS). Lac du Flambeau Police Chief Kathryn Makowski and Oneida Police Chief Rick Cornelius proposed that the WRS be expanded to allow tribal police officers to participate in it. They cited the difficulty of retaining experienced officers, who can find work with state and local law enforcement agencies that are part of the WRS, as the principal reason for their proposal. During committee discussion, it was noted that the State of Minnesota currently allows tribal police officers to participate in its retirement program.

The committee also heard from John Vincent, Acting Administrator, Division of Trust Finance and Employer Services, Department of Employee Trust Funds (ETF). Mr. Vincent described a number of issues related to this proposal, indicating that it would be necessary to adequately address each issue before the proposal could be implemented. In a March 25 memorandum to committee staff, Mr. Vincent elaborated on his testimony and identified steps that would be required to address each issue. A copy of that memorandum is enclosed.

This Memo is in two parts. The first part briefly describes the Minnesota program and its implementation. The second part discusses each issue identified in the March 25 ETF memorandum and presents legislative options, including the steps identified in the ETF memorandum, for the committee's consideration.

MINNESOTA PROGRAM

Program Description

The Minnesota Public Employees Retirement Association (PERA, referred to below as “the Minnesota program”) is administered as two parallel programs. One program, the Minnesota Police and Fire Retirement Plan (referred to below as “the Police and Fire Plan”) covers police officers and fire fighters. (Other police and fire department personnel may participate in this program, as well, although under different terms than the police and fire fighters.) The other program covers all other public employees.

In 2000, the Minnesota Legislature enacted a new law authorizing tribal police officers to participate in the Police and Fire Plan. [s. 353.64, subd. 11, Minn. Stats.] It applies to officers who exercise powers granted by the state to enforce state laws under statutes similar to the Wisconsin statute on that subject. [ss. 626.90 to 626.93, Minn. Stats., and s. 165.92, Wis. Stats.] A tribal police department may petition the retirement plan administrator to make certain findings regarding the department’s officers and to admit them to the plan. The administrator is required to grant such a petition if the Internal Revenue Service (IRS) makes a ruling that all of the following apply:

- The tribal police department is an agency or instrumentality of the state for purposes of enforcing state law.
- Contributions by the department to the fund on behalf of the officers are considered contributions to a governmental plan within the meaning of s. 414 (d) of the federal Internal Revenue Code (IRC).

When a petition is approved, the police department is required to immediately enroll all eligible officers in the plan. Thereafter, it must deduct and submit the employee’s contribution to the fund and submit the employer’s contribution to the fund. In addition, the police department is required to comply with certain reporting requirements.

Implementation

The Mille Lacs Band of Chippewa Indians’ was instrumental in developing the Minnesota program as it applies to tribal police, and it was the first tribe to enroll its police officers in the Police and Fire Plan. As required by the new law, the Mille Lacs Police Department sought and received a private letter ruling from the IRS in 2002. The ruling states that the department is an agency or instrumentality of the state for purposes of s. 414 (d), IRC, and that its participation in the Police and Fire Plan does not adversely affect the status of that plan as a government plan within the meaning of that section.

The analysis the IRS used to reach these conclusions looked only at tribal officers’ enforcement of state laws. It notes that the authority to do so is granted by the state and can be revoked by the state. It noted also that the exercise of the authority is regulated by the state, at both the state and local levels, through officer licensing, criminal background checks of officers, emergency dispatch, control of crime scenes and criminal investigations, and detention and prosecution of all persons arrested.

At this time, 64 police officers of five tribal police departments participate in the Police and Fire Plan.

ISSUES AND OPTIONS

This part of the Memo discusses the issues raised in Mr. Vincent's February 25 testimony and the April 25 ETF memorandum. It briefly describes each issue and then presents the action steps recommended by ETF, followed by additional options, as appropriate.

Internal Revenue Service

Issues

The ETF is directed by statute to ensure that the WRS complies with the IRC as a "qualified plan" for income tax purposes and is otherwise administered in a manner consistent with the IRC. [s. 40.03 (1) (am), Stats.] The importance of this is that income from funds invested by a qualified plan are exempt from taxation, a very significant benefit. One condition of a qualified plan is that it must be a "government plan," which the IRC defines, in pertinent part, as:

... a plan established and maintained for its employees by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of the foregoing.... [s. 414 (d), IRC.]

To maintain the WRS's status as a public plan, then, it may not cover any employees not described in the preceding definition. Stated differently, in order to add tribal police officers to the WRS, the ETF must be certain that those officers' employer, be it the tribal police department or the tribe itself, falls within that definition, specifically, that it is a political subdivision, agency, or instrumentality of the United States or of the State of Wisconsin. This is the reason that the Minnesota program requires that a tribal police department obtain a ruling from the IRS on this subject before its officers may enroll in the Police and Fire Plan.

The conditions for enforcement of state laws by tribal officers in Wisconsin are very similar to those in Minnesota. Although the IRS ruling obtained by the Mille Lacs Band states that it may not be cited as precedent, a similar argument could be made by a tribal police department in Wisconsin and might lead to a similar response from the IRS.

Options

ETF Recommendation: The ETF memorandum recommends that a tribe or a tribal police department wanting to participate in the WRS be required to first obtain an IRS ruling stating that: (a) the tribe or the tribal police department is an agency or instrumentality of the state for this purpose; and (b) its participation in the WRS will not adversely affect the WRS's status as a public plan. Legislation could make this a statutory requirement.

Alternative: Legislation could be silent on this issue on the assumption that, if the WRS's status as a public plan were questioned, the IRS would make findings regarding a tribal police department in

Wisconsin similar to its findings regarding the Mille Lacs Police Department. Note, however, that under its fiduciary responsibility to ensure the tax-exempt status of the Employee Trust Fund, the Employee Trust Fund Board most likely would raise a legal challenge to the inclusion of tribal police in the WRS if that were done without first obtaining the IRS ruling recommended by the ETF.

Social Security Administration

Issues

The ETF is the state administrator of Social Security under what is termed a “section 218 agreement” between ETF and the Social Security Administration (SSA). With limited exceptions, all participants in the WRS are required to participate in Social Security through the state’s 218 agreement. [s. 40.41 (4), Stats.] The ETF cites SSA guidance documents indicating that tribal governments are not treated as states for purposes of s. 218 of the Social Security Act. It asserts that, before a tribe could participate in Social Security through the state’s 218 agreement, it would be necessary to determine whether the SSA would amend the 218 agreement for this purpose.

The ETF’s comments are not pertinent to the proposal before the committee. Participation in the WRS is determined by state statute. The general rule that WRS participants must participate in Social Security under the state’s 218 agreement is state policy and can be modified by the state. The SSA’s willingness to amend the 218 agreement to include tribal employees would be determinative only if the proposal were to allow those employees to participate in Social Security under the agreement but, again, that is not the proposal before the committee.

Under current law, tribal police fall within one of the exceptions to the requirement that all WRS participants participate in Social Security. [s. 40.41 (6) (e), Stats.] However, that exception does not apply to other tribal employees. If the proposal were broadened to apply to tribal employees other than police, it would be necessary to amend s. 40.41 to treat those employees in a manner similar to police.

Options

ETF Recommendation: The ETF memorandum recommends that a tribe or a tribal police department wanting to participate in the WRS be required to first obtain an SSA ruling stating that: (a) the tribe or the tribal police department is a separate legal jurisdiction for the purposes of Social Security administration; (b) the SSA is willing to amend the section 218 agreement for this purpose; and (c) the SSA is satisfied by an opinion of the Wisconsin Attorney General that the tribe meets the definition of “employer” for purposes of the WRS. Legislation could make this a statutory requirement.

Alternatives: 1. Legislation could be silent on this subject on the understanding that Social Security participation is not a prerequisite of participation by tribal police in the WRS.

2. Legislation could exempt other tribal employees from the requirement to participate in Social Security if a tribe seeks to include any employees other than police in the WRS.

3. Legislation could require the SSA ruling recommended by the ETF memorandum if a tribe petitions for inclusion in the ETF’s Social Security coverage group.

4. With regard to participation in either the WRS or Social Security, legislation could omit the requirement for an Attorney General's opinion if the definition of "employer" is amended as discussed in the following section of this Memo.

Definition of "Employer" in Wisconsin Statutes

Issue

Participation in the WRS is employment based. An employer may elect to participate, and every employee of that employer is then included in the WRS. All agencies of the state are required to participate, and other employers may elect to participate. No person can participate in the WRS unless he or she is employed by a participating employer. "Employer" is defined as:

...the state, including each state agency, any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state, any federated public library system established under s. 43.19 whose territory lies within a single county with a population of 500,000 or more, a local exposition district created under subch. II of ch. 229 and a family care district created under s. 46.2895, except as provided under ss. 40.51 (7) and 40.61 (3) and subch. X. "Employer" does not include a local cultural arts district created under subch. V of ch. 229. Each employer shall be a separate legal jurisdiction for OASDHI purposes. [s. 40.02 (28), Stats.]

The salient feature of this definition is that it relates only to the state, subdivisions of the state, and certain special purpose units of government created under the authority of the state. It includes the term "other governmental unit," which could be argued includes tribal governments. However, the ETF views that term in the context of the definition as a whole, focused on the state and entities created by it. It concludes that, for purposes of the WRS, "employer" does not include tribal governments or tribal agencies and that tribal governments are not eligible to participate in the WRS for this reason.

Options

ETF Recommendations: The ETF memorandum recommends that:

1. A tribe or a tribal police department wanting to participate in the WRS be required to first obtain an opinion of the Wisconsin Attorney General stating that: (a) the tribe meets the definition of "employer" for purposes of the WRS; and (b) there is no constitutional bar to including tribal police in the WRS. The ETF did not identify any specific constitutional issue about which it is concerned.

2. If the policy decision is made to include tribal police in the WRS, the definition of "employer" be amended to include tribal governments.

Alternatives.

1. Legislation could pursue the second ETF recommendation, but not the first.

2. With regard to the second ETF recommendation, the definition of “employer” could be expanded to include one or more of the following:

- Tribal governments.
- Agencies of tribal governments.
- Tribal police departments.

The specific proposal before the committee, to allow tribal police officers to participate in the WRS, would be accomplished by adding only tribal police departments to the definition. However, as alternatives, legislation could be drafted more broadly to refer to agencies of tribal governments or to tribal governments themselves. Referring to tribal agencies would give tribes the greatest flexibility if at some time in the future there were an interest to enroll the employees of other units of tribal government in the WRS. Referring only to tribal governments, without a separate reference to agencies of tribal governments, would most likely be construed as requiring that any tribe participating in the WRS enroll *all* of its employees. On this policy choice, see also the discussion of inclusion of all employees of a participating employer, in the following section.

Note that if the committee chooses to expand the definition of “employer” to include either tribal governments or agencies thereof, it will be necessary to define those terms.

Coverage of All Employees

Issue

As noted above, once an employer elects to participate in the WRS, all of its eligible employees must participate. Mr. Vincent’s February 25 testimony noted several reasons for this. First, he raised the issue of adverse selection. If one group of participants in a retirement (or insurance) pool imposes higher costs on the pool than other members, i.e., receives benefits that cost more than the benefits received by others, some of the cost of the plan is shifted from these members to the other members. However, inclusion of only tribal police and not other tribal employees would not have that effect. This is because “protective service employees,” a category that includes police, are treated separately from all other employees. The calculation of their required contributions to the WRS is based on actuarial assumption specific to that category. Adding only tribal police to the WRS would have no effect on the costs for non-protective service participants.

Apart from adverse selection, *per se*, the testimony raised the possibility that tribal police officers would cost the system more than other protective service participants, increasing costs for all in that category. However, there is no evidence to suggest this would be the case, and in fact tribal police could prove to be less expense to the WRS. In any event, any effect would be very small, because there are very few tribal police compared to the large number of current protective service participants.

The testimony also noted the potential for administrative confusion when tribal employees move between covered and non-covered positions in the police department or in tribal government as a whole. It should be noted, though, that ETF has in place the means to track other employees who move in and out of public employment. Presumably, employees of a tribal police department would be tracked by

the same mechanism and any additional administrative burden would be minimal. Finally, the testimony indicated that research is needed to determine whether covering some but not all employees of a tribe would conflict with federal laws governing qualified public pension systems.

Options

ETF Recommendation: The ETF memorandum recommends that, if the policy decision is made to allow tribes to enroll only tribal police in the WRS, the statutes be amended to allow this.

Alternatives:

1. Legislation could be written more broadly to state that a tribal government may enroll any subset of its employees.

2. Legislation could remain silent on this question, with the result that current law would apply to whatever entity is the participating employer, be it the police department or the tribe itself. Note that, under this option, if the police department were the participating employer, all department employees would be required to enroll, not only the officers; if the tribe were the participating employer, all tribal employees would be required to enroll.

3. Legislation could apply either of the options involving a statutory change to all participating employers. Note that while this option would treat all participating employers the same, it would be a major policy change with potentially far-reaching ramifications for the WRS. It may be inappropriate for this committee to recommend a policy change that goes that far beyond the committee's charge and expertise.

Enforcement of Applicable Laws

Issue

The ETF administers the WRS, meaning, among other things, that it sets and enforces rules for participants. In addition, several boards set policies and rule on individual cases. The ETF rules and board rulings are enforced in the state court system. Both to ensure efficient administration and to maintain the fiscal integrity of the WRS, it is necessary that all participating employers be subject to effective enforcement of these rules and rulings. Examples of rules include the current rule that all employees must be enrolled, the rule that participating employers may not withdraw from the WRS, the requirement that participating employers submit periodic reports to ETF, the powers to subpoena witnesses and request information from participating employers, and many others.

Also, to maintain the fiscal integrity of the WRS, it is imperative that ETF be able to enforce participating employers' obligation to remit required employee and employer contributions. Obviously, the WRS cannot pay out retirement benefits to annuitants if active participants are not paying into it. Since all employers currently in the WRS are directly related to the state, the state has considerable control over them. The Legislature has given ETF the power to collect unpaid agency contributions directly from the agency's appropriations, and to collect unpaid contributions of a municipality from the municipality's state aid. Some mechanism would be required to ensure collection of contributions from a tribal employer, as well.

In his February 25 testimony, Mr. Vincent also raised the importance that tribal courts respect and enforce state court orders, such as divorce decrees ordering the assignment of retirement benefits, and that state courts respect and enforce similar tribal court orders. It would appear that this concern is adequately addressed by s. 806.245, Stats., which grants full faith and credit in state courts to all tribal court and tribal legislative actions and orders if reciprocal full faith and credit is granted by the tribe to state court and legislative actions and if certain other requirements are met.

Options

1. Legislation could condition participation of a tribal government or agency in the WRS upon receipt from the tribe of evidence that the tribe waives its sovereign immunity to the extent necessary for the state to enforce all rules relating to participating employers in the WRS and all ruling of the state boards having a role in the WRS.

2. Regarding collection of any contributions that a tribe fails to make, as an alternative to the preceding option, legislation could condition participation of a tribal government or agency upon maintenance by the tribe of a performance bond from which the state is authorized to withdraw funds to cover unpaid contributions.

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Enclosure