

CADDO PARISH EMPLOYEES' RETIREMENT SYSTEM



ADVISORY SERVICES REPORT
ISSUED NOVEMBER 25, 2015

**LOUISIANA LEGISLATIVE AUDITOR
1600 NORTH THIRD STREET
POST OFFICE BOX 94397
BATON ROUGE, LOUISIANA 70804-9397**

LEGISLATIVE AUDITOR
DARYL G. PURPERA, CPA, CFE

FIRST ASSISTANT LEGISLATIVE AUDITOR
AND LOCAL GOVERNMENT SERVICES
THOMAS H. COLE, CPA

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LOUISIANA LEGISLATIVE AUDITOR
DARYL G. PURPERA, CPA, CFE

November 25, 2015

**DR. WOODROW “WOODY” WILSON,
PARISH ADMINISTRATOR
AND ALL PARISH COMMISSIONERS
CADDO PARISH COMMISSION**
Shreveport, Louisiana

Dear Dr. Wilson and Commissioners:

As you are aware, my office received an allegation that the Caddo Parish Commissioners’ participation in the Caddo Parish Employees’ Retirement System (CPERS) was not constitutional. In my previous letter to you dated February 12, 2015, I informed you that my staff would be reviewing this matter carefully for compliance with law. My Advisory Services staff and Legal staff have completed their research and assessments, and this report presents our findings as well as recommendations to assist you in your efforts to ensure compliance with the Louisiana Constitution and improve controls over the management of CPERS.

Our assessments focused on (1) the legal basis for Parish Commissioners’ participation in CPERS; (2) public monies contributed by the Parish into CPERS on behalf of current and former Commissioners; and (3) controls over the Parish’s management of CPERS. Our assessment was limited in scope to the matters described in this report and was substantially less in scope than an audit. Your written response to this report is presented in Appendix A.

In summary, our findings are as follows:

1. It appears that the Caddo Parish Commissioners have been participants in a public retirement system (CPERS) in violation of Article X, Section 29.1 of the Louisiana Constitution.
2. As of December 31, 2014, the Parish has contributed public monies totaling \$258,665.78 into the CPERS 401(a) retirement accounts of current and former Commissioners. Since Commissioners do not appear to be constitutionally eligible to participate, these contributions may be considered donations in violation of Article VII, Section 14 of the Louisiana Constitution and in violation of Article X as cited above.
3. Controls need to be strengthened over the Parish’s management of CPERS.

After review of the Parish of Caddo's response to LLA's report, LLA feels compelled to respond to one particular statement of the Caddo Parish Commission. The Commission stated:

“It is Management’s intention to pursue, through this still pending lawsuit, a judicial determination regarding the conflict between the ordinance and state law. Once a final judgment is rendered, we will comply with the finding of the court regarding the legality of the ordinance in question.”

This response appears to suggest there is not a Constitutional question in regard to the Commissioners' participation in the CPERS Retirement System.

There is, however, in fact, a Constitutional question before the District Court in Caddo Parish. The Court, in the Declaratory Judgment, will decide whether the Caddo Parish Ordinance is constitutional given that Article X, Sec. 29.1 prohibits the Commissioners to be members of **any public retirement system, fund, or plan, sponsored by the State of Louisiana or any instrumentality or political subdivision thereof**. If the Court renders a judgment that the Ordinance is unconstitutional, as it applies to the Commission members, it appears, the Commissioners are agreeing that they will fully comply with the Court's ruling. It is the assumption of the Legislative Auditor that the Commissioners will also comply with the recommendations of the Legislative Auditor and seek to recover the improper contributions and establish a constitutional retirement system for Caddo Parish.

My staff will be monitoring the Parish's progress in resolving the issues presented in this report. If you have any questions, please contact my General Counsel Jenifer Schaye or Advisory Services Manager Eric Sloan at (225) 339-3800.

Respectfully submitted,



Daryl G. Purpera, CPA, CFE
Legislative Auditor

DGP/ch

FINDINGS AND RECOMMENDATIONS

Our assessments identified the following compliance and control issues which the Caddo Parish Commission (Parish) should address and resolve. We are providing recommendations to assist you in your efforts to ensure compliance with the Louisiana Constitution and strengthen controls over the management of the Caddo Parish Employees' Retirement System (CPERS).

1. Commissioner Participation in Public Retirement System

It appears that the Caddo Parish Commissioners have been participants in a public retirement system (CPERS) in violation of Article X, Section 29.1 of the Louisiana Constitution. Louisiana Constitution Article X, Section 29.1 provides that certain elected or appointed officials are deemed to be part-time public servants who, based on such part-time service, are not allowed to participate in, or receive credit for service in, any public retirement system, fund, or plan sponsored by the state of Louisiana or any instrumentality or political subdivision. These include, among others, legislators, board members, and parish council members.

Louisiana Constitution Article X, Section 29.1, effective January 1, 1997, was intended to end participation by part-time public servants in public retirement systems. In 1999, the Legislature amended Louisiana Revised Statute (La. R.S.) 11:1921 and made membership in the Parochial Employees' Retirement System's (PERS) optional for the unclassified employees of the Parish of Caddo. The Parish subsequently established through ordinance effective April 1, 2000, a retirement system for participation by unclassified employees which was defined to include the elected Commissioners. Ordinance No. 3762 states, in part, "WHEREAS, the Parish of Caddo desires to establish a retirement system, hereinafter referred to as the Caddo Parish Employees Retirement System (CPERS), for its employees under the provisions of Sections 401(a) and 457 of the Internal Revenue Code, as amended."

CPERS has existed for 15 years (2000-2015), and during that time there have been a total of 15 Commissioners who have chosen to participate. For every dollar of compensation contributed by a participant into their 457 account, the Parish contributes a discretionary percentage into their 401(a) account. The participant's 401(a) accounts are 100% publicly funded by the Parish, and the 457 accounts are 100% funded by the participants through payroll withholdings.

According to documentation provided by the Parish attorney, the Parish's position is "...participation in CPERS by Commissioners does not violate the Constitutional provision nor the implementing state statute in that the prohibition relative to a public retirement system relates to a defined benefit plan and not a defined contribution plan." However, the Legislative Auditor's position is that it is of no consequence whether CPERS is a defined contribution plan rather than a defined benefit plan. Regardless of how a plan works, or is defined, the Legislative Auditor maintains that the Constitution provides that these public officials cannot be a member of a State of Louisiana- or any political subdivision-sponsored retirement plan that contributes

public funds to their retirement. This is in accord with Louisiana Attorney General *Opinion No. 09-0115*.

In February 2015, the Parish filed suit requesting the 1st Judicial District Court to declare that the Parish contributions made to CPERS on behalf of the Commissioners do not violate the Constitution (Article X, Section 29.1) or La. R.S. 11:164. The Parish filed a *Petition for Declaratory Judgment* stating that “Neither the Parish nor any Commissioner is aware of any court decision determining whether contribution by a home rule parish to a defined contribution plan on behalf of members of the parish governing body violates Article X, Section 29.1 of the Constitution and La. R.S. 11:164.” The Parish maintains that the Commissioners’ participation in CPERS is not unconstitutional as CPERS is a defined contribution plan and not a defined benefit plan.¹

On July 8, 2015, judgment was rendered in open court and was signed by the judge on August 24, 2015. The judge ordered that the Parish be granted 15 days to amend its petition to state a cause of action, and that if the Parish did not do this, its *Petition for Declaratory Judgment* would be dismissed without prejudice. The 15-day period has since elapsed, and it does not appear that the Parish has filed an amended pleading as of October 9, 2015.

Background

Beginning on July 2, 1991, the Omnibus Budget Reconciliation Act of 1990 imposed mandatory Social Security coverage on state and local government employees unless they were members of a public retirement system or their services were already covered (for Social Security) under a written voluntary agreement pursuant to the provisions of Section 218 of the Social Security Act. (Note: The Social Security Director for Louisiana informed us that Caddo Parish does not have a Section 218 agreement.)

On July 28, 1993, the Parish adopted an ordinance that authorized Commissioners and unclassified employees to make retirement contributions to the Parish’s deferred compensation program in lieu of the Parochial Employees’ Retirement System’s (PERS) defined benefit plan. According to documentation provided by the parish attorney, PERS subsequently sued Caddo Parish, and in 1997 the court ruled that the ordinance was unconstitutional because membership in PERS was mandatory.

Prior to 1997, the Louisiana Constitution did not prohibit part-time elected officials from participating in a public retirement system. However, on January 1, 1997, Louisiana Constitution Article X, Section 29.1 became effective, which states that it is unconstitutional for any member of a police jury or parish council to participate in or receive credit for service in any public retirement system, fund or plan, sponsored by the State of Louisiana or any instrumentality or political subdivision of the State of Louisiana.

¹ A **defined benefit plan** promises a specified monthly benefit to participants at retirement which is commonly calculated through a plan formula that considers such factors as age, years of service, and salary. By contrast, a **defined contribution plan** provides benefits based solely on the amounts contributed to the participant’s account, including investment gains and losses and any earnings and fees associated with the account.

In 1999, the Legislature amended Louisiana Revised Statute 11:1921 and made membership in PERS optional for the unclassified employees of the Parish. Prior to this amendment, their membership in PERS was mandatory. Although this statutory amendment allowed unclassified employees to opt out of PERS, this amendment did not alter or amend the Louisiana Constitution.

Effective April 1, 2000, the Parish established through ordinance (No. 3762) a retirement system for participation by unclassified employees. Section 2-52 of the Caddo Parish Code of Ordinances provides that unclassified employees of the Parish are eligible to participate in CPERS and defines unclassified employees as:

- (1) Parish Commissioners;
- (2) The Commission clerk;
- (3) The Parish Administrator;
- (4) The Parish Administrator's secretary and the Parish Administrator's assistants;
- (5) The Parish Attorney;
- (6) The Assistant Parish Attorney and the Parish Attorney's legal assistant;
- (7) The director of departments and one principal assistant for each such director;
- (8) The Parish Engineer; and
- (9) Any former unclassified employee who made an irrevocable election.

The 2000 ordinance provides that any unclassified employee who chooses not to participate in CPERS must make an election to become a member of PERS or the Social Security System, whichever system is applicable. Therefore, Commissioners and employees who participate in CPERS do not participate in the Social Security System.

Our research indicates that CPERS is a public retirement system that is used as an alternative to mandatory Social Security coverage. A public retirement system (also referred to as a FICA replacement plan), as defined in Internal Revenue Code [26 USC 3121(b)(7)(F)] and Regulation [26 C.F.R. 31.3121(b)(7)-2(e)], "is a pension, annuity, retirement or similar fund or system maintained by a state or local government that provides a retirement benefit to the employee that is comparable to the benefit provided under the Old-Age portion of the Old-Age, Survivors and Disability Insurance (Social Security) part of FICA." In order to be a retirement system for this purpose, the plan must provide a minimum retirement benefit. In general, there are two types of public retirement systems that may meet the minimum benefit requirement - the defined contribution plan and the defined benefit plan. Various plan types can meet this requirement, including defined contribution plans established under IRC Sections 401(a) and 457. A defined contribution plan (that meets the definition of a retirement system) must provide for an allocation to the employee's account of at least 7.50% of the employee's annual

compensation. Contributions from both the employer and the employee are allowed to be used to make up the 7.50%.

Despite the Parish's lengthy (1993 to 2000) legal effort to establish CPERS, Parish officials could not provide the Legislative Auditor with a written legal opinion that supported the Parish's position that the Commissioners' participation in CPERS does not violate the state Constitution (Article X, Section 29.1).

Furthermore, although voluntary and not required by the Internal Revenue Service (IRS), it appears that the Parish did not request/receive an IRS Determination Letter to provide it with advance assurance that the terms of CPERS conform to the requirements of IRC section 401(a) and is entitled to favorable tax treatment.

Recommendations

The Parish should consult with specialized legal counsel to address the following actions:

- cease enrolling Parish Commissioners in CPERS,
- initiate a dialogue with the Social Security Administration and IRS for guidance considering that Social Security coverage is mandatory for those who do not participate in a public retirement system (or whose services are not covered under a Section 218 agreement), and
- request the IRS review the CPERS plan and issue a determination letter.

2. Public Monies Contributed into Retirement Accounts of Commissioners

According to records as of December 31, 2014, the Parish has contributed public monies totaling \$258,665.78 into the CPERS 401(a) retirement accounts of current and former Commissioners. Since Commissioners do not appear to be constitutionally eligible to participate, these contributions may be considered donations in violation of Article VII, Section 14 of the Louisiana Constitution² and in violation of Article X, Section 29.1.

Furthermore, by comparison, had these Commissioners been properly participating in the Social Security program, our calculations indicate the Parish would have paid Social Security taxes totaling \$122,124.97, a savings of \$136,540.81 to the parish taxpayers.

Since November 2004,³ the Parish has had an agreement with an out-of-state third-party service provider (Security Benefit) to provide participant account recordkeeping and administrative services for CPERS. Each month, the Parish remits contributions to Security Benefit for deposit into the participant's 401(a) and 457 accounts. The combined balance in the two accounts is the total amount available for investment by participants. After three years of

² **Article 7, Section 14 of the Louisiana Constitution** provides, in part, "...that except as otherwise provided by this constitution, the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private."

³ We were informed that Prudential was the previous third-party service provider.

creditable service, CPERS participants have a 100% vested interest in the public monies contributed into their 401(a) account and are entitled to withdraw the value of all cumulative contributions and earnings thereon.

The following table shows the total public funds contributed by the Parish into each participating Commissioner's 401(a) retirement account at December 31, 2014, along with their account value on that date.

Commissioners	Parish Contribution Periods	Parish Contributions ⁴ Paid into CPERS 401(a) Accounts	CPERS 401(a) Account Values at December 31, 2014 ⁵
1. Jerald Bowman	2013-2014	\$4,286.08	\$4,348.93
2. Clifford Collins	2004-2008	8,001.74	43.89
3. David Cox	2004-2014	19,685.33	26,820.93
4. Douglas Dominick	2007-2014	24,342.06	33,135.55
5. Kenneth Epperson	2008-2014	22,093.00	26,558.22
6. John Escude	2006-2014	25,087.32	33,904.57
7. Lyndon Johnson	2010-2014	11,132.26	13,260.47
8. Matthew Linn	2008-2014	21,899.31	27,538.03
9. Michael Long	2002-2006	7,474.25	0
10. Stephanie Lynch	2004-2014	30,157.37	31,419.48
11. Rose McCulloch	2000-2010	20,322.88	32,236.73
12. Carl Pierson	2009-2011	8,462.02	0
13. Jimmy Smith	2006-2014	24,898.32	30,043.33
14. Michael Thibodeaux	2008-2014	22,216.95	22,901.11
15. Michael Williams	2011-2014	8,606.89	8,879.58
Total		\$258,665.78	\$291,090.82

As the account values at December 31, 2014 indicate in the above table, former Commissioners Collins, Long, and Pierson have withdrawn contributions from their 401(a) retirement account. We were informed that, as of September 18, 2015, Stephanie Lynch is the only Commissioner to withdraw contributions in 2015.

⁴ According to records provided by the Parish

⁵ According to records provided by Security Benefit (third-party service provider)

According to our calculations, the Parish paid \$136,540.81 more into Commissioner 401(a) retirement accounts than it would have been required to pay the federal government had these Commissioners been participating in the Social Security program. Under Social Security, the Parish (employer) would be required to pay a tax totaling 7.65% of each Commissioner's eligible earnings. This tax, referred to as the Federal Insurance Contributions Act (FICA) tax, is comprised of a 6.20% Social Security tax and a 1.45% Medicare Hospital Insurance tax. However, the Parish is already paying the Medicare tax on the earnings of Commissioners since Medicare coverage is mandatory (for public employees hired or rehired after March 31, 1986) regardless of membership in a public retirement system. Therefore, for comparison purposes in the following table, we do not include the Medicare taxes since it is required to be paid under both CPERS and Social Security.

Commissioners	Total Eligible Earnings ⁶ (2000-2014)	(A) Parish Contributions Paid into CPERS 401(a) Accounts	(B) LLA Calculated Social Security Tax Contribution (6.20% of Eligible Earnings)	(A-B) Excess Parish Contributions Paid into CPERS 401(a)
1. Jerald Bowman	\$33,415.33	\$4,286.08	\$2,071.75	\$2,214.33
2. Clifford Collins	74,982.06	8,001.74	4,648.89	3,352.85
3. David Cox	221,494.38	19,685.33	13,732.65	5,952.68
4. Douglas Dominick	163,457.04	24,342.06	10,134.34	14,207.72
5. Kenneth Epperson	146,637.35	22,093.00	9,091.52	13,001.48
6. John Escude	169,173.88	25,087.32	10,488.78	14,598.54
7. Lyndon Johnson	87,344.77	11,132.26	5,415.38	5,716.88
8. Matthew Linn	145,407.83	21,899.31	9,015.29	12,884.02
9. Michael Long	83,498.56	7,474.25	5,176.91	2,297.34
10. Stephanie Lynch	222,262.34	30,157.37	13,780.27	16,377.10
11. Rose McCulloch	191,002.68	20,322.88	11,842.17	8,480.71
12. Carl Pierson	48,184.44	8,462.02	2,987.44	5,474.58
13. Jimmy Smith	167,973.88	24,898.32	10,414.38	14,483.94
14. Michael Thibodeaux	147,424.99	22,216.95	9,140.35	13,076.60
15. Michael Williams	67,497.58	8,606.89	4,184.85	4,422.04
Total	\$1,969,757.11	\$258,665.78	\$122,124.97	\$136,540.81

⁶ According to records provided by the Parish

Background

Each year, a contribution rate schedule is established for participants in CPERS. We were informed that the annual contribution rate schedule for the CPERS defined contribution plan has historically been based on the annual PERS rate that the Parish contributes on behalf of its employees who participate in PERS. However, we note that contrary to CPERS, PERS is a defined benefit plan whose annual contribution rate is actuarially determined every fiscal year (according to statutory process) to provide a certain level of benefits upon participants' retirement.

Participants are required to select a percentage of their compensation to contribute to their 457 account with the minimum being 5%. The Parish's contribution percentage is calculated on a pro-rata basis up to the employer rate that it is required to contribute to PERS. According to Parish records, the maximum rate contributed by the Parish to the participant's CPERS 401(a) accounts, with some exceptions, was equal to the annual PERS rate. From the years 2000 to 2014, the maximum rate contributed by the Parish ranged from 7.75% (2000-2005) to 16.75% (2013). The Parish's maximum contribution rate for 2015 is 14.50%, which is equal to the PERS employer rate for 2015.

For a participant to receive the Parish's maximum contribution rate, the participant has to contribute at least 9.50% of their compensation into their 457 account. For example, according to 2014 Parish records, seven participating Commissioners contributed at least 9.50% of their compensation into their 457 account and received the Parish's maximum matching contribution of 16.00% deposited into their 401(a) account. In terms of dollars for example, in 2014, if a Commissioner earned \$22,000 and contributed at least \$2,090 (9.50% x \$22,000) into their 457 account, the Parish would make a contribution of \$3,520 (16.00% x \$22,000) into their 401(a) account.

Recommendations

The Parish should:

- comply with Louisiana Constitution Article X, Section 29.1 and cease contributing additional public monies into the CPERS accounts of participating Commissioners, and
- consult with legal counsel on options to remedy and recoup the improper contributions paid into the retirement accounts of Commissioners.

3. Controls over CPERS

Controls need to be strengthened over the Parish's management of CPERS. Good controls require that management be able to fully account for all public retirement system documentation and ensure that all such documentation is complete, consistent, properly executed, and up-to-date. Also, good controls require that written procedures be developed and implemented to provide a clear understanding of what should be done, how it should be done, who should do it, and when it should be done.

Documentation

Plan documents appeared to be missing, and certain documents did not contain information consistent with other documents provided. Since there was not a complete audit trail of documentation, it was not clear which plan documents have governed CPERS since inception. The following table is a comparison of the three adoption agreements⁷ and summary plan description provided with areas of inconsistencies:

Areas	Adoption Agreement (A)	Adoption Agreement (B)	Adoption Agreement (C)	Summary Plan Description (SPD)
Title	Individually Designed Adoption Agreement for Governmental 401(a) Money Purchase Plan ⁸	Security Benefit Advisor Retirement Program – Adoption Agreement for Governmental Defined Contribution Plan and Trust	Security Benefit Retirement Program – Adoption Agreement for Governmental Defined Contribution Plan and Trust-Profit Sharing Plan ⁹	Caddo Parish Commission Employees' Retirement System Summary Plan Description
Date	Not dated ¹⁰	11/9/04	1/28/11	Not dated
Signature	Not signed	Parish Administrator	Parish Administrator and Director of Finance	Not signed
Plan Name	Caddo Parish Employees' Retirement System	Caddo Parish 401(a) Defined Contribution Plan	Caddo Parish 401(a) Defined Contribution Plan	Caddo Parish Commission Employees' Retirement System
Base Plan Document Name	Individually Designed Document Governmental 401(a) Money Purchase Plan	Base Plan Document not provided (The adoption agreement indicates the Parish adopted "Security Benefit Advisor Governmental Defined Contribution Plan and Trust")	Base Plan Document not provided (The adoption agreement indicates the Parish adopted "Security Benefit Governmental Defined Contribution Plan and Trust")	Base Plan Document not provided (The SPD indicates the Parish adopted a Profit Sharing Plan and Trust and states, "A copy of your Plan is on file at your Employer's office...")
Plan Administrator	Director of Human Resources	Employer (Parish)	Employer (Parish)	Director of Human Resources
Plan Trustee	Director of Human Resources	None noted	Director of Finance	Director of Finance
Parish's 401(a) Contribution Formula	Fixed match equal to 81.579% of participant's contribution to 457 Plan of at least 5% but not to exceed 9.50% of participant's compensation	Match equal to a discretionary percentage, determined by the Parish, of the participant's contribution to 457 Plan	Match equal to a discretionary percentage, determined by the Parish, of the participant's contribution to 457 Plan	An amount equal to 100% of participant's contribution to the 457 Plan up to the amount contributed to PERS

Although we were provided two Adoption Agreements (B and C) that reference a Security Benefit base plan document and a Summary Plan Description document that indicates CPERS is a profit sharing plan, the Parish's Director of Finance told us the document named "Individually Designed Document Governmental 401(a) Money Purchase Plan" (included within Adoption Agreement A) is the only full plan document that represents the CPERS plan that she is aware of and that this document has not been updated.

⁷ An **adoption agreement** is a separate agreement executed by the employer which sets forth the elective provisions of the plan as specified by the employer.

⁸ With a **money purchase plan**, the plan states the employer contribution percentage that is required.

⁹ With a **profit sharing plan**, the plan accepts discretionary employer contributions.

¹⁰ "5/1/02" was handwritten at the top of page 1.

Written Procedures

There were no written procedures for how the contribution schedule is established during the Parish's annual budget process nor were there procedures that detailed how the Parish's contribution percentages are determined.

The Parish's contribution to the CPERS 401(a) plan appears to be based on two factors: (1) the percentage contribution made by the participant to their 457 plan and (2) the PERS rate paid by the Parish for employees participating in PERS. However, none of the three adoption agreements make any specific reference to the Parish's current practice of using the annual PERS contribution rate as the basis for establishing the annual contribution schedule.

Also, there is a 2005 Parish Ordinance (No. 4343) that states, in part, "Each member shall select a percentage to contribute to the CPERS, with the parish's contribution determined in accordance with the contribution schedule that is outlined in the official plan document. The contribution schedule will be established annually during the budget process." However, neither the "official" plan document, "Individually Designed Document Governmental 401(a) Money Purchase Plan," nor the related adoption agreement contains such a contribution schedule or the method/procedures by which it is to be established.

Furthermore, the two signed Adoption Agreements (B and C) that relate to Security Benefit base plans indicate that the Parish's matching contributions are equal to a discretionary percentage as determined by the Parish. However, there were no written procedures as to how the discretionary percentage is to be determined.

Recommendations

The Parish should:

- formally adopt a comprehensive CPERS plan that complies with all applicable federal and state legal requirements. Prior to adoption, we advise that independent retirement plan specialists be engaged to perform a detailed review of all plan and related documentation, including the Parish's current practices and contribution rates, to provide the Parish with recommendations on any updates/modifications needed and alternative retirement options available; and
- require the Director of Finance to strengthen controls over the management of CPERS. Retirement system documentation should be complete, consistent, properly executed, and up-to-date. Also, written procedures should be developed and implemented detailing how the contribution schedule is established during the annual budget process, including how/when the Parish's matching contributions are calculated and paid.

APPENDIX A

Management's Response



THE PARISH OF CADDO

ADMINISTRATION

November 2, 2015

Telephone • 318.226.6900
Fax • 318.429.7630

Dr. Woodrow Wilson, Jr.
ADMINISTRATOR, CEO

Randy M. Lucky
ASSISTANT ADMINISTRATOR

GOVERNMENT PLAZA
505 Travis Street • Suite 800
P.O. Box 1127
Shreveport, Louisiana 71163-1127

www.caddo.org

Mr. Daryl G. Purpera, CPA, CFE
Louisiana Legislative Auditor
1600 North Third Street
Baton Rouge, Louisiana 70804-9397

Dear Mr. Purpera:

Your team has completed its Audit of the Caddo Parish Commission Employee Retirement (CPERS) Program. I am of the opinion that your team of Auditors conducted a thorough review of the organization's CPERS program, and they conducted themselves in a professional manner.

We are in receipt of the *Draft Report* that your office issued October 22, 2015 and are providing you with Management's Responses, which are as follows:

RESPONSE TO LEGISLATIVE AUDITOR

RE: 1. Commissioner Participation in Public Retirement System

When Management learned of this issue, we opened an inquiry seeking an authoritative resolution. Because the issue centers on the asserted conflict between a duly adopted ordinance and state law, the only authoritative and binding method available is a judicial determination.

Therefore, Management sought and obtained approval from the Commission to seek a judicial ruling in the form of a declaratory judgment on the issue. Our lawsuit was opposed by the State on multiple grounds. The action was recently dismissed by the trial court which held that the Parish and State did not have a real or "justiciable" controversy. (See attached Opinion and Judgment granting the State's exception of no cause of action based on lack of a justiciable controversy in *Caddo Parish v. State of Louisiana*, No. 582,733, 1st Judicial District Court, Caddo Parish, Louisiana).

Fortunately, in the interim, a citizen also filed suit seeking, among other things, a ruling by the judge on the same issue. The trial court recently dismissed many parts of that case. The remaining issues in the lawsuit include declaratory judgment on the legality of the Caddo Parish Commissioner's participation in CPERS. (See attached Opinion sustaining exceptions in

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Elliott Stonecipher v. Caddo Parish, Louisiana, No. 583,388, 1st Judicial District Court, Caddo Parish, Louisiana.

The exceptions sustained in the case are as follows:

- A. Dilatory Exception of Lack of Procedural Capacity on Behalf of the Parish and the Commission: the Court found that the Commission is not an entity which can sue or be sued and the Commission is dismissed from the lawsuit.
- B. Peremptory Exception of No Right of Action on Behalf of the Parish and the Commission: by the Court found that the plaintiff has not shown an increased tax burden due to the actions of the Parish nor alleged a personal stake in the legality of the Parish ordinances.
- C. Peremptory Exception of No Right of Action to Demand to Collect Sums That May Be Owed to the Parish and the Commission: the Court found that only the Parish, pursuant to the Parish Charter, Section 6-06 has the right to seek repayment of amounts paid out by the Parish.
- D. Peremptory Exception of No Cause of Action on Behalf of the Commissioners, Parish Administrator and Parish Finance/Personnel Director: the Court found that all actions taken by Commissioners have been done in their official capacities and even should the ordinances subsequently be found to be unconstitutional, such would not give rise to a cause of action against individual Commissioners.
- E. Peremptory Exception of No Right of Action on Behalf of the Commissioners, Parish Administrator and Parish Finance/Personnel Director: the Court found that only the Parish, pursuant to the Parish Charter, Section 6-06 has the right to seek repayment of amounts paid out by the Parish.

It is Management's intention to pursue, through this still pending lawsuit, a judicial determination regarding the conflict between the ordinance and state law. Once a final judgment is rendered, we will comply with the finding of the court regarding the legality of the ordinance in question.

RE: 2. Public Monies Contributed to Retirement Accounts of Commissioners

It is duly noted on the amount of funds contributed by the organization on behalf of the Commissioners who have and are participating in the CPERS Retirement Plan; however, a judicial

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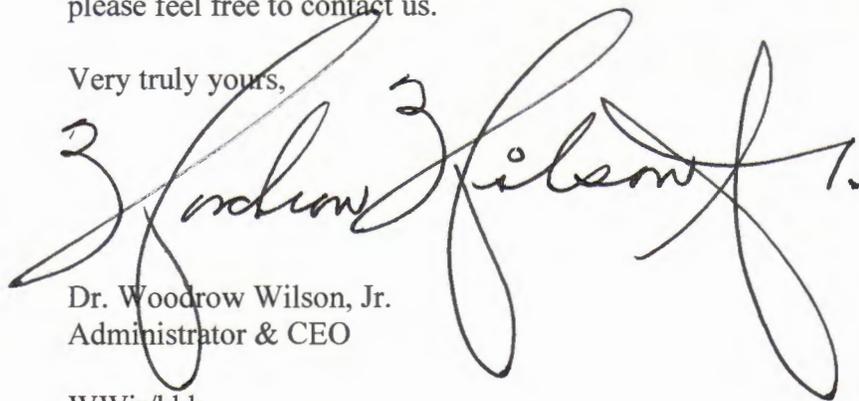
determination is pending regarding whether Commissioners may legally participate in CPERS. At the time such is rendered, the Parish will comply fully with the Court's ruling.

RE: 3. Commissioner Participation in Public Retirement System

Caddo Parish understands the importance of having adequate internal controls over the management of CPERS. Once a final court ruling is received establishing the legality of Commissioners' participation in CPERS, the Parish will take the necessary steps to formally update and adopt a comprehensive CPERS plan that complies with all applicable federal and state legal requirements. The Parish will consult with independent retirement experts to ensure all pertinent items are addressed in the plan document including eligible employees, contribution rates, and process for annual updates. Additionally, the Director of Finance and HR will strengthen controls over the management of CPERS to include developing and implementing written procedures and establishing formal review processes to include a plan operations review to verify that the plan is operating according to the plan document and a plan document review to determine if the plan document requires updating.

In closing, you are reminded that we are awaiting the outcome of the District Court's decision concerning a legal ruling on the Caddo Parish Commissioners' participation in the organization's CPERS system. If there are any other questions that need to be answered concerning this matter, please feel free to contact us.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read "Dr. Woodrow Wilson, Jr." with a large flourish at the end.

Dr. Woodrow Wilson, Jr.
Administrator & CEO

WWjr/kkb

Attachments

PLACED IN MINUTES

FILED

AUG 24 2015
Shawnee Barnhill
DEPUTY CLERK OF COURT
Caddo Parish

CADDO PARISH NO. 582733-C
VERSUS 1ST JUDICIAL DISTRICT COURT
THE STATE OF LOUISIANA CADDO PARISH, LOUISIANA
JUDGMENT

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This case came before the Court on June 29, 2015, pursuant to the State of Louisiana's Peremptory Exception of No Cause of Action, Declinatory Exception of Improper Venue, and Peremptory Exception of Nonjoinder. Judgment was rendered in open court on July 8, 2015.

Present in court were:

Emily G. Andrews and John Morris, counsel for the Defendant, the State of Louisiana and M. Thomas Arceneaux and Jerry Edwards, counsel for the Plaintiff, Caddo Parish After considering the pleadings, memoranda, law, and arguments of counsel:

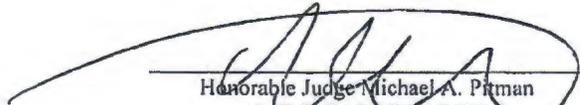
IT IS ORDERED, ADJUDGED AND DECREED that the State of Louisiana's Peremptory Exception of No Cause of Action is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Caddo Parish be and is hereby is granted 15 days from the date of this Judgment within which to amend its Petition in an attempt to state a cause of action, and that, if Caddo parish does not do so, that Caddo Parish's Petition for Declaratory Judgment be dismissed without prejudice at the Plaintiff's cost.

IT IS FURTHER ORDERED, ADJUGED AND DECREED the Declinatory Exception of Improper Venue is moot at this time.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the Peremptory Exception of Nonjoinder is moot at this time.

Shreveport, Louisiana this 24 day of August, 2015.


Honorable Judge Michael A. Pitman
1st JDC, CADDO PARISH

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ELLIOTT B. STONECIPHER

DOCKET NO: 583,388 - A

VERSUS

1st JUDICIAL DISTRICT COURT

CADDO PARISH, ET AL

CADDO PARISH, LOUISIANA

OPINION

Plaintiff, Elliott B. Stonecipher ("Stonecipher"), a citizen, property owner, taxpayer and registered voter of both the City of Shreveport and Caddo Parish, Louisiana, filed suit against defendants, Caddo Parish, ("the Parish"), the Caddo Parish Commission ("the Commission"), all of the Caddo Parish Commissioners ("the Commissioners"), the Parish Administrator for Caddo Parish, Woodrow Wilson, Jr. ("Wilson") and the Director of Finance and Human Resources for Caddo Parish, Erica Bryant ("Bryant") seeking to challenge several ordinances passed by the Commission pertaining to (1) the Commissioners' participation in the Caddo Parish Employees Retirement System ("CPERS"); (2) the Commissioners participation in group medical benefits and life insurance plans offered by the Parish; (3) annual cost-of-living increases to the Commissioners' salaries; (4) mileage reimbursements to the Commissioners for travel outside of Caddo Parish on parish business; and (5) the Parish's policy and practice of providing each Commissioner with an annual travel allowance.

With regard to the Commissioners, Stonecipher seeks issuance of a judgment declaring that they (1) are part-time employees of the Parish; (2) are not eligible to participate in or receive retirement or pension benefits from CPERS; and (3) are not eligible to receive: (a) life and health insurance coverage or benefits from the Parish; (b) a travel allowance from the Parish; (c) annual cost-of-living increases; nor (d) mileage reimbursements from the Parish. Stonecipher also seeks

the issuance of an injunction prohibiting the Commissioners from accepting or receiving (1) any further retirement or pension benefits from CPERS or the Parish or (2) any further life and health insurance coverage or benefits, travel allowances, cost-of-living increases or mileage reimbursement from the Parish. With regard to Bryant, Stonecipher seeks the issuance of an injunction prohibiting her from approving, authorizing, permitting or allowing the transfer, payment or provision of (1) any further or additional pension or retirement benefits or credits from CPERS or the Parish to any of the Commissioners or (2) any further or additional life and health insurance coverage or benefits, travel allowances, cost-of-living increases or mileage reimbursements from the Parish to any of the Commissioners. With regard to the Commissioners, Wilson and Bryant, collectively, Stonecipher seeks the issuance of an injunction directing the Commissioners, Wilson and Bryant to (1) pay to CPERS or the Parish all of the pension or retirement benefits which each Commissioner has received from CPERS or the Parish and (2) reimburse, restore, return and/or pay all of the compensation, remuneration and benefits which each of the Commissioners has received from the Parish over and above their salaries, including any life and health insurance coverage or benefits, travel allowances, cost of living increases or mileage reimbursements.

The Parish and the Commission filed a Dilatory Exception Of Lack Of Procedural Capacity And Peremptory Exception Of No Right Of Action asserting that the Court should dismiss Stonecipher's claim against the Commission because the Commission does not have the power to sue or be sued. They further assert that Stonecipher's request for injunctive relief should be dismissed because Stonecipher cannot show a real and actual interest independent from his interest as

a taxpayer. Additionally, The Parish and the Commission contend that Stonecipher does not have the right to demand to collect sums that may be owed to the Parish.

The Commissioners, Wilson and Bryant filed Peremptory Exceptions Of No Cause Of Action And No Right Of Action. The Commissioners assert that Stonecipher's cause of action challenging an official act of the Commissioners must be directed towards the Parish. The Commissioners further assert that they are immune from any individual liability with regard to acts undertaken in connection with their service on the Commission. Wilson and Bryant assert that neither individual played any role in passing the ordinances that Stonecipher seeks to challenge and, further, that neither individual has the authority to take any action with regard to the ordinances or implementation of any parish policy or practice. The Commissioners, Wilson and Bryant lastly assert that Stonecipher has no right of action to obtain a judgment in his favor ordering them to pay any amounts which may be owed to the Parish or CPERS.

DILATORY EXCEPTION OF LACK OF PROCEDURAL CAPACITY ON BEHALF OF THE PARISH AND THE COMMISSION

Lack of procedural capacity is a dilatory exception which tests a party's legal capacity to bring an action or to have one brought against it. *Bright Morning Star Missionary Baptist Church v. Brown*, 38,333 (La.App.2d Cir. 5/28/04), 877 So.2d 1003, writ not considered, 04-2136 (La.11/15/04), 877 So.2d 466; *Palowsky v. Premier Bancorp, Inc.*, 597 So.2d 543 (La.App. 1st Cir. 1992); *Dugas v. City of Breaux Bridge Police Department*, 99-1320 (La.App.3d Cir. 2/2/00), 757 So.2d 741, writ denied, 00-00671 (La. 4/20/00), 760 So.2d 1159.

Article 6, §44(4) of the Constitution of the State of Louisiana defines a "governing authority" as "the body which exercises the legislative functions of the

political subdivision". Under the Home Rule Charter of the Parish of Caddo, the legislative power of the parish government is vested in the Caddo Parish Commission. Section 2-02 of the Home Rule Charter of Caddo Parish, Louisiana.

In *Roberts v. Sewerage and Water Board of New Orleans*, 92-2048 (La. 3/21/94), 634 So.2d 341, the Supreme Court adopted a functional approach for determining whether a political subdivision is a separate and distinct juridical person.

The important determination with respect to the juridical status or legal capacity of an entity is not its creator, nor its size, shape or label. Rather the determination that must be made in each particular case is whether the entity can appropriately be regarded as an additional and separate government unit for the particular purpose at issue. In the absence of positive law to the contrary, a local government unit may be deemed to be a juridical person separate and distinct from other government entities when the organic law grants it the legal capacity to function independently and not just as the agency or division of another government.

The court emphasized that "such a determination will depend on an analysis of specifically what the entity is legally employed to do". The Revision Comments to La. C.C. Art. 24 further provide that "[t]he capacity of a juridical person is governed by the provisions in its charter, governing legislation and customs." Therefore, in determining whether defendants are juridical persons and, thus, have procedural capacity, we look to the manner in which they function and the authority that created them.

The Commission has alleged it is not a juridical person with the power to sue or be sued as contemplated by Louisiana law. In support of its position, the Commission cites *Urban Housing of America, Inc. Louisiana v. City of Shreveport*,

CIV. A. 09-0317, 2013 WL 587894, at *4 (W.D. La. Feb. 13, 2013), which states in relevant part:

“Louisiana courts have consistently held that city councils, parish sheriff’s offices and city permit offices are not separate government units with the capacity to sue or be sued. These divisions are branches or parts of the greater corporate body politic or juridical entity, i.e., the city itself, are not autonomous or self-governing legal entities and, therefore, do not possess the capacity to be sued.”

The Commission is the legislative branch and governing authority of the Parish pursuant to Section 2.02 of the Home Rule Charter. The Commission is a branch or part of the greater juridical entity, the Parish. It is vested with the legislative powers of Caddo Parish which are specifically governed by the Home Rule Charter of the Parish of Caddo and applicable Louisiana law.

The Commission is not *sui juris* or juridically independent of the Parish. It is neither an entity to which the law attributes personality, nor a juridical person with the procedural capacity to sue or be sued. See *City Council of the City of Lafayette v. Bowen*, 94-584 La. App. 3d Cir. 11/2/94, 649 So.2d 611, writ denied, 94-2940 La. 1/27/95, 650 So.2d. 244. Accordingly, the Dilatory Exception Of Lack Of Procedural Capacity on behalf of the Parish and the Commission as it relates to the Commission is hereby SUSTAINED.

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION ON BEHALF OF THE PARISH AND THE COMMISSION

Article La. C.C.P. Art. 681 provides in pertinent part, “...an action can be brought only by a person having a real and actual interest which he asserts.” Our jurisprudence recognizes the right of a taxpayer to enjoin unlawful action by a public body. Under Louisiana law, a taxpayer may resort to judicial authority to restrain public servants from transcending their lawful powers or violating their

legal duties in any unauthorized mode which would increase the burden of taxation or otherwise unjustly affect the taxpayer or his property. The fact that a taxpayer's interest may be small and insusceptible of accurate determination is not sufficient to deprive him of the right. *Louisiana Associated General Contractors, Inc., et al v. The Calcasieu Parish School Board*, 586 So.3d 1354 (La. 1991).

A taxpayer will not be allowed to compel the performance of a public duty by mandamus absent a showing of some special interest which is separate and distinct from the interest of the public at large. Unlike a citizen attempting to compel the performance of a public duty, a citizen attempting to restrain unlawful action by public entity is not required to demonstrate a special or particular interest distinct from that of the public at large. Consequently, the taxpayer plaintiff seeking to restrain action by a public body is afforded a right of action upon a mere showing of an interest, however small or indeterminable. *Id.*

The allegations in Stonecipher's petition do not sufficiently prove that the actions of the Parish or the Commission have or would, with certainty, increase his tax burden or otherwise unjustly affect him or his property. However, proof of an increased tax burden is not the only method by which a taxpaying citizen may seek judicial authority to restrain a public body from alleged unlawful action. Stonecipher has not alleged a personal stake in the legality of ordinances at issue in this suit. Under these circumstances, the Court finds Plaintiff's interest in the present lawsuit insufficient to seek injunctive relief. As such, the Peremptory Exception Of No Right Of Action on behalf of the Parish and the Commission is SUSTAINED.

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION (TO DEMAND TO COLLECT SUMS THAT MAY BE OWED TO THE PARISH) ON BEHALF OF THE PARISH AND THE COMMISSION

Home Rule Charter, Section 6-06 provides in pertinent part that “any authorization of payment or incurring of obligation in violation of the provisions of this Charter shall be void and any payment so made illegal;...Such persons shall also be liable to the parish government for any amount so paid.” The right to seek repayment of the amounts paid by the Parish pursuant to the subject ordinances belongs to the Parish. Therefore, the Peremptory Exception Of No Right Of Action on behalf of the Parish and the Commission in this regard is SUSTAINED.

PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION ON BEHALF OF THE COMMISSIONERS, WILSON AND BRYANT COMMISSIONERS

Stonecipher concedes that he has not asserted and is not asserting any claims against the Commissioners in connection with official actions taken by the Commissioners in the course and scope of their official duties as members of the Commission. However, Stonecipher asserts that the actions of the Commissioners were and are directly contrary to and violative of the relevant provisions of the Louisiana Constitution of 1974, the Louisiana Revised Statutes and the Home Rule Charter of Caddo Parish, Louisiana and, therefore, were and are ultra vires - - i.e., outside or beyond the purview and scope of the Commissioners' lawful powers and authority.

All of the actions alleged to have been taken by the Commissioners were done in their official capacities at the Commission meetings and were the result of ordinances passed by the Commission. If the ordinances and policies passed by the

Commissioners acting in their official duties as Commissioners are subsequently declared unconstitutional such does not give rise to a cause of action against the Commissioners. Consequently, the Peremptory Exception Of No Cause Of Action filed by the individual Commissioners in their individual capacities is SUSTAINED.

WILSON AND BRYANT

Plaintiff also concedes that he has not asserted and is not asserting any cause of action against Wilson or Bryant in connection with the passage and adoption of the ordinances at issue in this proceeding. As such, the Peremptory Exception Of No Cause Of Action on behalf of Wilson and Bryant is SUSTAINED.

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION ON BEHALF OF THE COMMISSIONERS, WILSON AND BRYANT

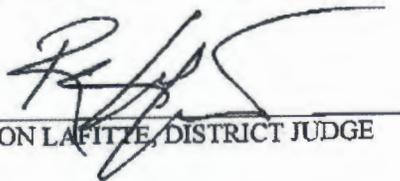
Plaintiff is seeking to make the Commissioners, Wilson and Brian liable to the Parish for the return, reimbursement, and/or repayment of parish funds or monies at issue in this proceeding under Section 6-06 of Home Rule Charter of Caddo Parish. For the reasons stated above in connection with the Peremptory Exception No Right of Action filed on behalf of the Parish and the Commission, the Peremptory Exception Of No Right Of Action filed on behalf of the Commissioners, Wilson and Bryant is SUSTAINED.

For the foregoing reasons, the Dilatory Exception Of Lack Of Procedural Capacity on behalf of the Parish and the Commission as it relates to the Commission is SUSTAINED. The Peremptory Exception Of No Right Of Action on behalf of the Parish and the Commission is SUSTAINED. The Peremptory Exception Of No Right Of Action (to demand to collect sums that may be owed to the Parish) on behalf of the Parish and the Commission is SUSTAINED. The

Peremptory Exception Of No Cause Of Action on behalf of the Commissioners, Wilson and Bryant is **SUSTAINED**. The Peremptory Exception Of No Right Of Action on behalf of the Commssioners, Wilson and Bryant is **SUSTAINED**.

Counsel for Mover, the Parish and the Commission, is requested to prepare a Judgment in accordance with this Opinion.

OPINION RENDERED, READ AND SIGNED this 28th day of October, 2015.



RAMON LAFITTE, DISTRICT JUDGE

Distribution:

J. Whitney Pesnell, attorney for Stonecipher,
via facsimile # (318) 227-9762

Jerry Edwards, attorney for the Parish and the Commission,
via facsimile # (318) 227-2967

Michael Lowe, attorney for the Commissioners, Wilson and Bryant
via facsimile # (318) 562-2751