



Office of the Attorney General
State of Texas

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November 29, 1995

The Honorable Barry B. Telford
Chair
Committee on Pensions & Investments
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 95-075

Re: Whether, subsequent to the merger of a municipality's pension plan for volunteer fire fighters, established under V.T.C.S. article 6243e, with the Volunteer Fire Fighters' Relief and Retirement Fund, established under V.T.C.S. article 6243e.3, the state board of trustees of the Volunteer Fire Fighters' Relief and Retirement Fund may require the municipality to contribute additional funds to pay benefits for retired fire fighters who receive benefits under V.T.C.S. article 6243e (ID# 34011)

Dear Representative Telford:

On behalf of the City of River Oaks (the "city"), you ask about a municipality's responsibility to provide the Volunteer Fire Fighters' Relief and Retirement Fund with money to pay unfunded prior-service costs after the municipality's pension fund and the Volunteer Fire Fighters' Relief and Retirement Fund have merged. A letter included with your request articulates the factual basis for the inquiry:

Effective September 1, 1989, the City of River Oaks Volunteer Fire Department entered into a contract with the Texas Statewide Volunteer Fire Fighters' Retirement Fund to participate in the Fire Fighters' Retirement Fund created by S.B. 411, Acts of the 65th Legislature, Regular Session, 1977 (Article 6243e.3, Vernon's Texas Civil Statutes) ("the 411 System"). Paragraph 2(b.) of this contract states that the lump-sum amount of prior service owed by River Oaks is \$25,923.¹ The city paid this amount to the 411 System within one

¹The Office of Fire Fighters' Pension Commissioner submitted a copy of the contract between the River Oaks Volunteer Fire Department and the Texas Statewide Volunteer Fire Fighters' Retirement Fund. The contract specifies that the River Oaks Volunteer Fire Department voted to participate in the statewide retirement fund beginning September 1, 1989. Paragraph 2 of the contract provides for the relevant governing body's contributions to the "Fire Fighters' Retirement Fund S.B. 411":

- a. Dues of \$12.00 per month will be made in behalf of each participating fire fighter, to be paid in advance and at least annually.

year by transferring \$35,163.26, the amount remaining in the local pension fund ("the 258 plan"), to the 411 System. The purpose of the contract was to merge the two retirement plans.

At the time of the merger, there were a number of retired volunteer fire fighters drawing a pension under the 258 plan. The City has been informally notified that the money for paying the pension of these retired fire fighters is running out and that the city must contribute more money. [Footnote added.]

We understand a local pension plan created pursuant to article 6243e, V.T.C.S., commonly is referred to as a "258 plan." Additionally, we understand the statewide pension system, created pursuant to article 6243e.3, V.T.C.S., commonly is referred to as the "411 system." We will use these terms throughout this opinion.

From the facts as you have stated them, we assume your question concerns the necessity of further contributions from the city to pay benefits to retired fire fighters who are receiving benefits under the local 258 plan. You specifically asked, however, about a city's liability for "unfunded prior service." In our opinion, the city misunderstands the meaning of the term "unfunded prior-service cost," as used in article 6243e.3, section 11(h). While article 6243e.3 does not appear to authorize the fire fighters' pension commissioner to request further contributions from the city for unfunded prior-service cost, the commissioner must require further contributions from the city to pay benefits to retired fire fighters receiving benefits under the city's 258 plan.

(footnote continued)

b. The lump-sum amount of prior service is \$25,923.00.

A one (1) year payout has been chosen to fund the above prior service accounting to the provisions in Section 11 of the Act under S.B. 411. An interest rate of 0% has been assumed in the 10 and 20 year payout method to be actuarially sound. The 3 year payout is interest free.

An amount of \$25,923.00 will be paid into the "Fire Fighters' Retirement Fund S.B. 411"

c. An amount of at least \$300/year/retired fire fighter and \$200.04/year/spouse will be paid into the "Fire Fighters' Relief and Retirement Fund S.B. 411" for retirees and spouses merging from the Texas Local Fire Fighters' Retirement Act pension system (formerly H.B. 258), according to the provision in Section 11(g) of the Act under S.B. 411. Retired fire fighters will be paid \$600.00/year. Widows \$400.08/year.

The River Oaks fire department amended its contract in June 1990, reducing the monthly pension a retiree and spouse merged from the Texas Local Fire Fighters' Retirement Act pension system receives and buying "prior service without buy-back at a cost of \$13,173.00."

To resolve your question, we must examine articles 6243e and 6243e.3, V.T.C.S. Article 6243e, the Texas Local Fire Fighters Retirement Act, establishes a fire fighters' retirement system and trust fund in each municipality with a fire department consisting exclusively of volunteers,² but only if the department was organized prior to September 1, 1989, and remains a regularly organized department,³ and if the municipality does not participate in the 411 system. V.T.C.S. art. 6243e, §§ 3(b), 4; *see infra* at 4-6 (describing 411 system).

The board of trustees of a 258 plan pays to a retired member⁴ of the plan or the member's spouse or children retirement, disability, or death benefits. V.T.C.S. art. 6243e, §§ 12, 14-15. For example, a member of a 258 plan who retired for reasons unrelated to disability generally is entitled to a monthly benefit of \$100, if the member's services were not exclusively voluntary, or \$25, if the member's services were exclusively voluntary. *Id.* § 12.

By 1977, the legislature discovered that many of the local 258 plans were actuarially unsound. The legislature sought to remedy the problem by creating a statewide pension plan. House Comm. on State Affairs, Bill Analysis, C.S.S.B. 411, 65th Leg. (1977).

There are now some 310 local volunteer fire fighters pension funds. Many of them are small and are reportedly actuarially unsound. Participation is optional, and many volunteers have no coverage. This bill seeks to set up a central state pension fund with essentially local administration. . . . The goal is an actuarially sound fund that

²For purposes of article 6243e, a volunteer is "a person who regularly performs services for a fire department, who is a member of the retirement system that includes the fire department, and who either receives no compensation for those services or regularly receives compensation for those services of less than \$200 a month." V.T.C.S. art. 6243e, § 2(8).

³Article 6243e, V.T.C.S., section 2(5) defines "regularly organized fire department" as "a unit that is responsible primarily for fighting fires and responding to other emergencies each day and that has specialized equipment for use in performing those tasks."

⁴In general, the membership of a 258 plan is comprised of employees of the fire department who are younger than thirty-six years old on the date the individual is certified under civil service as eligible for a beginning position with the department, *but see* V.T.C.S. art. 6243e, § 9(f), as well as qualified volunteer fire fighters. *Id.* § 9(a), (b); *see supra* note 2 (defining "volunteer" for purposes of V.T.C.S. article 6243e). The board of trustees may impose a waiting period before membership in the retirement system begins, V.T.C.S. art. 6243e, § 9(c)(1); the board may include or exclude fire department personnel who are not regularly, directly engaged in fire fighting, such as personnel who perform emergency medical services or services related to the fire department, *id.* § 9(c)(2), (3). The board also may require, as a condition of membership in the 258 plan, an employee or volunteer to take a physical examination. *Id.* § 9(e).

will provide a minimum \$240 monthly disability benefit, a minimum \$5,000 death benefit and a small monthly retirement payment.

House Study Group, Bill Analysis, C.S.S.B. 411, 65th Leg. (1977).

The Sixty-fifth Legislature consequently enacted article 6243e.3, V.T.C.S., the Texas Statewide Volunteer Fire Fighters Retirement Act. See V.T.C.S. art. 6243e.3, § 1A. Section 2(a) of article 6243e.3 creates in the state treasury the Fire Fighters' Relief and Retirement Fund, a trust fund.

The governing body of a political subdivision within which a fire department subject to article 6243e.3⁵ is situated, including a political subdivision within which a rural fire prevention district is situated,⁶ may exempt itself from participation in the 411 system. See *id.* § 2(b); see also *id.* § 1(13) (defining "governing body"). If, however, the governing body does not exempt itself from the 411 system, the governing body must "contribute for each fire fighter at least \$12 for each month of service beginning on the date the fire fighter enters the pension system." *Id.* § 2(c). In addition, the state annually contributes that amount of money needed to keep the fund actuarially sound, although the state's contribution may not exceed the amount of one-third of the total of all annual contributions from governing bodies. *Id.* § 2(d).

Each fire fighter who performs services for a fire department is a member of the 411 system unless, among other reasons, the governing body of the fire department has exempted itself from participation. *Id.* § 2A(a), (b); see also *id.* § 1(9) (defining "member fire fighter" as fire fighter who participates in 411 pension system). The 411 system pays to its members or their beneficiaries retirement, disability, or death benefits. See *id.* §§ 3, 4, 5. For example, upon retirement for reasons not related to disability, a member receives a monthly retirement annuity "equal to six times the governing body's average monthly contribution over the member fire fighters's [*sic*] term of qualified service under" article 6243e.3. *Id.* § 3(b). A fire fighter who has served in excess of fifteen years is entitled to an additional seven percent of the monthly pension compounded annually for each year in excess of fifteen. *Id.* § 3(c).

Evidently to further its goal of including as many volunteer fire fighters as possible in an actuarially sound pension program, the legislature authorized a municipality to merge

⁵A fire department is subject to article 6243e.3 if it has at least ten active volunteer fire fighters. See V.T.C.S. art. 6243e.3, § 1(1) (defining "qualified service"). The fire department must conduct at least two drills each month, each at least two hours long, and each active member must attend at least 40 percent of the drills and 25 percent of the fires. See *id.*

⁶Article 6243e.3, section 1(13) specifies that the rural fire prevention district must be created pursuant to Health and Safety Code chapter 794. *Id.* § 1(13).

its 258 plan with the statewide 411 system if a majority of the qualified fire fighters⁷ vote in favor of the merger. V.T.C.S. art. 6243e.3, § 10. The merger of a municipality's 258, or "current," pension plan, with the statewide 411 system, or "pension system," is described in article 6243e.3, section 11:

(a) When a fire department under a current pension plan elects to participate in the pension system in this Act, the current pension plan is merged with the pension system.

(b) The costs of the current pension plan shall be determined on an actuarially sound basis. The costs must be certified by a qualified actuary as of the effective date of merger or within three years preceding the date of merger.

(c) On the date of merger, all assets and liabilities of the current pension plan are transferred to the pension system and become an allocated part of the system. The assets may be merged with the pension system assets for investment purposes, but a separate account must be maintained for the funds allocated to each plan that has merged with the system.

(d) Following merger, a member's retirement benefits in the pension system are determined by either the future-service method or the buy-back method. The options are available only to fire fighters participating in the current pension plan.

(e)(1) In the future-service method, the qualified service required to earn retirement benefits in the pension system begins as of the date of merger. For determining a person's retirement benefits in the pension system, a fire fighter may choose the formula for benefits used in the current pension plan or the formula for benefits as outlined in this Act. Any retirement benefits accrued prior to the date of merger will also be paid on retirement according to the formula for benefits under the current pension plan.

(2) In the buy-back method in determining the fire fighters' retirement benefits in the pension system, a fire fighter may choose the formula for benefits used in the current pension plan or the formula for benefits as outlined in this Act. The fire fighter who has less than 15 years of service remaining before retirement as of the

⁷The Statewide Volunteer Fire Fighters Retirement Act, V.T.C.S. art. 6243e.3, does not define "qualified fire fighter." From the definition of "qualified service" in section 1(1), however, we assume that a qualified fire fighter serves without monetary remuneration, is a member in good standing of a fire-fighting unit with at least ten active members, and attends at least 40 percent of the department's drills and 25 percent of the fires to which the department is called.

date of merger may count time served under the current pension plan before the date of merger as qualified service if the service complies with the *minimum drill and fire attendance requirements* provided for qualified service. The time period necessary to make 15 years of service before retirement may be used.

(f) A fire fighter who terminates service prior to the date of merger of his fire department's current pension plan with the pension system is entitled to receive at retirement age the retirement benefits vested under the pension plan in effect during his service. The pension system pays his benefits.

(g) Any benefits being paid by the current pension plan at the date of merger will be paid by the pension system following merger.

(h) On merger of a current pension plan with the pension system, the sponsors of the current pension plan are obligated to make contributions to the pension system in this Act to fund the unfunded prior-service cost. The unfunded prior-service cost is determined as of the date of merger. The period of funding these contributions shall not exceed 20 years measured from the date of merger. The state board of trustees may not charge interest on a series of contributions to pay unfunded prior-service costs if the total unfunded prior-service costs of a current pension plan are paid not later than the third anniversary of the date of merger. The state board of trustees may by rule impose interest on all contributions if the total is not paid within the three-year period.

(i) [Providing for election of local board of trustees.]

Section 11(h) of article 6243e.3 appears integral to resolving your question. Under that section, a municipality's "unfunded prior-service cost" must be determined as of the date of the merger. Section 11(h) clearly requires the sponsors of the municipality's current pension plan to fund the unfunded prior-service cost, and if the sponsors pay the entire cost within three years of the merger, section 11(h) precludes the state board of trustees of the 411 system from charging interest on the unfunded prior-service cost.

From your question, we deduce that you interpret the term "unfunded prior-service cost" in section 11(h) to include benefits that retirees who were members of the city's 258 plan are receiving. Nothing in article 6243e.3 defines the term "unfunded prior-service cost." We believe, however, that the term refers only to the costs associated with nonretired volunteer fire fighters who remain active in the department, that is, the costs of funding the future service and buy-back methods described in section 11(e).

Section 11(e)(2) hints at the intended meaning of the phrase “unfunded prior-service cost.” In describing the buy-back method, section 11(e)(2) discusses “time served under the current pension plan before the date of the merger” Both subsections (1) and (2) suggest that a fire fighter who was a member of the 258 plan and is now a member of the 411 system will, upon retirement, receive benefits for services rendered under both plans.⁸ Prior services rendered by such a member of the 411 system under a 258 plan will not be funded by the municipality’s minimum twelve-dollar per month contribution under article 6243e.3, section 2(c), however. Hence, the terminology “unfunded prior service” describes the 411 system member’s service under a municipality’s 258 plan.

Moreover, section 11(d) provides that, “[f]ollowing merger, a *member’s* retirement benefits . . . are determined by either the future-service method or the buy-back method.” (Emphasis added.) A member is a fire fighter who continues to perform services for a fire department that participates in the 411 system. V.T.C.S. art. 6243e.3, § 2A(a). Expressly excluded from membership in the 411 system is an individual who is retired under article 6243e.3. In our opinion, the definition of membership also excludes an individual who is retired under article 6243e.

The rules of the board of the Texas Statewide Volunteer Fire Fighters’ Retirement Fund lend credence to this determination. In its rules, the board states that “[p]rior service includes every *active* member of the department who is at least 18 years old.” Rules and Regulations of The Texas Statewide Volunteer Fire Fighters’ Retirement Fund—S.B. 411 rule (C)(1)(a) (available from Office of Fire Fighters’ Pension Commission) (emphasis added). The calculation of prior-service cost thus involves only the prior service of nonretired fire fighters under the 258 plan. *See id.* rule (C)(1)(c).

If an agency charged with the administration of a statute interprets the statute in a reasonable way, a court generally will uphold the agency’s interpretation. 67 TEX. JUR. 3D *Statutes* § 155, at 783-84 (1989) (and sources cited therein). Article 6243e.3, section 21(b) requires the board of trustees to “establish rules and regulations necessary for the administration of the fund.” *See also* V.T.C.S. art. 6243e.3, § 19(i) (authorizing fire fighters’ pension commissioner to recommend to state board of trustees rules to implement article 6243e.3). Accordingly, we are compelled to uphold the board’s rules if they reasonably interpret the statute. We believe the board’s construction is reasonable; moreover, we believe it is consistent with legislative intent as suggested in article 6243e.3, section 11(e), as well as the legislature’s desire to create an actuarially sound, statewide pension system for volunteer fire fighters, *see* House Study Group, Bill Analysis, C.S.S.B. 411, 65th Leg. (1977).

⁸According to the board, prior service includes both buy-back and accrued time. *See* Office of Fire Fighters’ Pension Commission, Prior Service—S.B. 411 (available from Office of Fire Fighters’ Pension Commission).

The legislature designed the 411 system "so that benefits stay in step with contributions . . ." *Id.* In our opinion, to make the 411 system liable for costs attributed to payments to firefighters who have retired under a 258 plan would upset the funding balance of the 411 system.

With respect to benefits that must be paid fire fighters who have retired under a 258 plan, section 11(g) states that, following merger, the pension system will pay such benefits. Article 6243e.3 does not, however, explicitly stipulate the funding source for such payments. Nothing in article 6243e nor article 6243e.3 suggests that the 411 system is liable for benefits to fire fighters who have retired under a 258 plan. Nevertheless, the article specifies only three sources of funds from which to pay pensions:⁹ the governing body's \$12 per month contribution under article 6243e.3, section 2(c) for nonretired fire fighters who are members of the 411 pension system; the state's annual contribution, pursuant to article 6243e.3, section 2(d), to make the fund actuarially sound; and the governing body's contribution, pursuant to section 11(h), to cover the cost of unfunded prior service.

The state's contribution must go into the Fire Fighters' Relief and Retirement Fund, which must be used solely for members of the 411 system. See V.T.C.S. art. 6243e.3, § 2. The governing body's \$12 per month contribution is explicitly earmarked for members of the 411 system. Additionally, as we have determined, the unfunded prior-service cost discussed in section 11(h) pertains only to nonretired fire fighters who were members of the 258 plan and now are members of the 411 pension system. If a municipality does not contribute an additional amount to pay for benefits to retired fire fighters under the 258 plan, the 411 system must use money earmarked for the other purposes. Clearly, the legislature did not intend such a result.

Thus, in regard to payments to retired fire fighters who receive a pension under article 6243e, V.T.C.S., the board of trustees of the 411 system is responsible only to forward to a retiree of the 258 plan, in monthly increments, that money the municipality has contributed for the retiree's benefits. The fire fighters' pension commissioner also "provides technical assistance and administrative oversight to local fire fighter retirement systems under" article 6243e.¹⁰ Texas Sunset Advisory Commission Staff Evaluation, Office of Fire Fighters' Pension Commissioner 6 (1990).

⁹We also note that article 6243e.3, section 2(e), V.T.C.S., authorizes the Fire Fighters' Pension Commissioner to receive contributions to the fund set up in article 6243e.3.

¹⁰In its 1990 evaluation of the Office of Fire Fighters' Pension Commissioner, the Texas Sunset Advisory Commission described the evolution of the office:

[Fire departments in Texas] are generally staffed by paid fire fighters or by volunteers. . . . Generally, paid fire departments offer pension benefits to their employees. In addition, a portion of the volunteer departments also provide pension benefits. Since 1937, the state has played a role in the oversight of these

Under article 6243e.3, therefore, the governing body of a political subdivision within which a fire department or rural fire prevention district is located must contribute for three separate purposes. First, pursuant to article 6243e.3, section 2(c), each such governing body must contribute, on behalf of each nonretired fire fighter with qualified service, at least \$12 per month. Second, pursuant to article 6243e.3, section 11(h), each governing body must contribute, on behalf of each nonretired fire fighter who was a member of the local 258 plan, an amount sufficient to cover those fire fighters' retirement benefits in the 411 system, that is, the unfunded prior-service cost. This cost is determined as of the date of the merger, and the governing body may pay it off in a lump sum or over a period of time. See V.T.C.S. art. 6243e.3, § 11(h). Third, we believe the governing body must contribute annually the amount the 411 system pays to retired fire fighters who are receiving benefits under article 6243e. See also Fire Fighters' Pension Report, 1991 Annual Report 9 (stating that cities merging with 411 system "are billed for the exact cost each year of their . . . [article 6243e] retirees and spouses").

(footnote continued)

pension systems and in the actual provision of pension benefits. This role has been carried out by the Office of the Fire Fighters' Pension Commissioner (OFFPC).

The agency was created in 1937 with the enactment of H.B. No. 258 of the 45th Legislature. The legislation established guidelines for fire fighters' retirement systems at the local level, requiring cities, towns, and villages with over \$1,000 worth of fire fighting equipment to establish a firemen's relief and retirement fund with a local board of trustees. The fire fighters' pension commissioner was required to oversee the local retirement systems.

These responsibilities have changed over time, while other responsibilities have been added. Legislation was passed to create independent retirement systems in the larger metropolitan areas of the state. . . . Still other cities decided to provide for their fire fighters' retirement through the Texas Municipal Retirement System (TMRS). The agency's oversight authority over local fire department pension plans, not governed by a specific state statute, or not participating in TMRS, continued. The commissioner monitored the distribution of benefits and status of the local funds. The commissioner also continued to hear appeals from individuals aggrieved by the local pension board of trustees. . . . Today, under TLFRA, 170 departments report to the agency. Of these, 128 are volunteer departments, 37 are staffed by paid fire fighters, and five are staffed by both volunteers and paid fire fighters.

While the oversight function has existed since 1937, the agency was assigned another function related exclusively to volunteer fire departments in 1977. In that year, the legislature expanded the agency's authority to include administration of the Texas Statewide Volunteer Fire Fighters' Retirement Fund. . . . A state board of trustees was established for oversight and the commissioner assists the trustees in managing and investing the fund.

Texas Sunset Advisory Commission Staff Evaluation, Office of Fire Fighters' Pension Commissioner 3 (1990).

In summary, we conclude that, for purposes of article 6243e.3, section 11(h), "unfunded prior-service cost" includes only the cost the governing body of a municipality merging its 258 plan with the 411 system must pay the 411 system fund for nonretired, active fire fighters who have accrued benefits under the 258 plan. "Unfunded prior-service cost" does not include benefits retired fire fighters or their spouses receive under the 258 plan. Pursuant to section 11(h), a municipality's unfunded prior-service cost must be calculated at the time the 258 plan and the 411 system merge. The board of trustees of the 411 system fund are not authorized, subsequent to the merger, to seek additional funds from the municipality for unfunded prior-service cost. The board may require the municipality to pay, on an annual basis, the amount retirees or spouses are entitled to receive under the 258 plan.¹¹

S U M M A R Y

Article 6243e.3, section 11, V.T.C.S., provides the procedure by which a municipality that has established a local pension plan for its volunteer fire fighters under V.T.C.S. article 6243e may merge the plan with the statewide pension system established pursuant to article 6243e.3. For purposes of article 6243e.3, section 11(h), "unfunded prior-service cost" includes only the cost the governing body of such a municipality must pay the 411 system fund for nonretired, active fire fighters who have accrued benefits under the local, article 6243e plan. "Unfunded prior-service cost" does not include benefits retired fire fighters or their spouses receive under the article 6243e plan.

¹¹Our construction is consistent with the Office of the State Auditor's interpretation of article 6243e.3. The Office of the State Auditor has described a governing body's required contributions as follows:

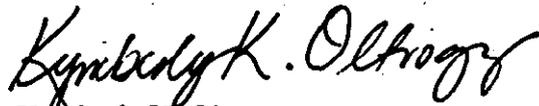
(1) A minimum of \$12 per month . . . for each volunteer fire fighter. Larger contributions may be made at the discretion of the governing body in order to increase benefits.

Plus, if applicable:

(2) *Annual funding of liability in connection with benefits accrued prior to entry into the Pension System, under the pension plan in effect prior to September 1, 1977, plus additional contributions to "buy back" benefits to purchase vested benefits as though the Act had been in effect for 15 years at age 55 for a fire fighter.*

Pursuant to section 11(h), a municipality's unfunded prior-service cost must be calculated at the time the municipality's article 6243e plan and the statewide article 6243e.3 system merge. The board of trustees of the statewide pension system fund are not authorized, subsequent to the merger, to seek additional funds from the municipality for unfunded prior-service cost. The board may, however, require the municipality to pay, on an annual basis, the amount retirees or spouses are entitled to receive under the municipality's article 6243e plan.

Yours very truly,



Kimberly K. Oltrogge
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Opinion Committee