

**MINUTES OF THE SPECIAL MEETING OF THE BOARD OF TRUSTEES
ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM
MAY 23, 2011**

A special meeting of the Board of Trustees of the Arkansas Public Employees Retirement System was held on Monday, May 23, 2011 at 9:00 a.m., in the Conference Room, 124 West Capitol, Little Rock, Arkansas. Mr. Artee Williams presided.

QUORUM PRESENT:

Mr. Williams recognized the presence of a quorum.

BOARD MEMBERS PRESENT:

Mr. Artee Williams (State Employee Member), *Chair*, Director, Dept. of Workforce Services
Mr. Maurice Henry (School Employee Member), *Vice-Chair*, Fulton, AR
Ms. Ouida Wright (State Employee Member), Conway, AR
Mr. Bill Gaddy (State Employee Member), Little Rock, AR
Judge Mike Jacobs (County Employee), Clarksville, AR
Mayor Steve Northcutt (City Employee), Malvern, AR
Ms. Janet Harris, Deputy State Auditor (*proxy*)
Ms. Karla Shepard, State Treasurer's Office (*proxy*)
Dr. John Shelnett, Dept. of Finance and Administration (*proxy*)
Ms. Gail H. Stone (Executive Director), APERS

BOARD MEMBERS ABSENT:

Hon. Richard Weiss (Ex-Officio Member), Dept. of Finance and Administration
Hon. Charlie Daniels (Ex-Officio Member), State Auditor
Hon. Martha Shoffner (Ex-Officio Member), State Treasurer

VISITORS PRESENT:

Mr. Skippy Leek, Desha County Circuit Clerk
Mr. Byron Freeland, Attorney for Mr. Leek
Ms. Gaye Brown, Desha County Assessor
Ms. LeeAnne Dickens, Court Reporter
Mr. Mark Whitmore, Arkansas Municipal League (*arrived late*)
Mr. Chris Villines, Association of Arkansas Counties (*arrived late*)
Mr. Mike Wickline, *Arkansas Democrat-Gazette*

STAFF PRESENT:

Ms. Michele Williams, APERS Deputy Director
Mr. Jay Wills, APERS Attorney Specialist
Mr. Craig Blackard, APERS Internal Auditor
Ms. Abbi Bruno, APERS Retiree Services Manager
Ms. Jacobia Twiggs, APERS Retirement Coordinator
Ms. Linda McGrath, APERS Administrative Specialist

NEWS MEDIA NOTIFIED:

A letter of notification of the Arkansas Public Employees Retirement System Board meeting was sent to the Arkansas Democrat-Gazette, the Associated Press, Television Station KLRT/FOX16, Radio Station KARN, and Radio Station KAAY. This letter of notification is pursuant to A.C.A 25-19-101 (Act 93 of 1967) as amended-The Freedom of Information Act.

HEARING FOR MS. SKIPPY LEEK:

Mr. Jay Wills, APERS Legal Council, introduced Mr. Skippy Leek and gave a basic outline of his work/retirement history. Then he introduced Mr. Byron Freeland, MR. Leeks' legal counsel. Mr. Wills explained that a packet with both parties' materials had been sent to all Board members prior to the meeting without objections. In addition, parts of the transcript from the (Jo West) Taylor hearing that were sent to Board members last week, would be included in the records as part of this hearing, with the addition of Ms. Taylor's testimony in that hearing. Since most of the testimony had been handled prior, there was a very short list of witnesses: Mr. Skippy Leek, the defendant, and Ms. Gaye Brown, the Desha County Assessor.

Mr. Wills explained that Staff would go first, giving their opening argument, followed by Mr. Byron Freeland, who was representing by Mr. Leek. Once the opening arguments were out of the way, both attorneys would have a chance to question the witnesses. The Trustees would be allowed to ask questions of the witness and each lawyer would be given a final chance to redirect until the witness is exhausted. After that, each side would give statements and then the Board would be asked to render a decision.

Mr. Wills began with a detailed breakdown of Mr. Leek's employment as a circuit clerk with Desha County and actions he's taken that identified him to APERS Staff as having retired incorrectly. He applauded Mr. Leek for being totally open and candid in his responses to Staff's queries. Mr. Wills gave a summary of Mr. Leek's responses and stated that, based upon these answers, Staff determined that Mr. Leek had failed to meet the standards required for termination from employment in order to be eligible for retirement benefits. There had also been a second issue brought up, to wit, if Mr. Leek had never retired effectively, when he was elected to a new term of office he should be eligible for additional credit under the APERS.

Mr. Freeland addressed the Board, introducing himself and his client. He pointed out that as of January 1, 2007, when Mr. Leek first began collecting retirement benefits he had 36 years of service credit in APERS (since he receives 2:1 credit as a circuit clerk). Had he not retired, Mr. Leek would have an extra 12 years of service credit to draw against, in addition to a higher salary. Mr. Freeland stated that Mr. Leek had retired in a manner in which he believed was proper, back in 2007. At that time, the law required that a public official be out of office (terminate employment) for 90 days. (Currently, the requirement is 180 days.)

During those 90 days, Mr. Freeland said that Mr. Leek quit accepting his salary and paid his own insurance premiums; a cost to him of about \$11,000. Mr. Leek did go in and take care of his circuit clerk duties; and since he had already been re-elected, he would have resumed his duties on January 1, 2007. Mr. Freeland argued that his client had substantially complied with the requirement of the statute, that Mr. Leek should not be penalized for having a sense of duty; his actions actually saved the county money and did not cost the State of Arkansas or APERS any additional money.

Mr. Freeland commented that the Board had a fiduciary duty to its participants and stated that his client should not be penalized for misleading or confusing information distributed by APERS Staff to members. He said he would provide testimony that proved APERS was aware that individuals were merely "taking themselves off the payroll" for retirement purposes, but never indicated that this was insufficient to qualify as "termination". Mr. Freeland further argued that not only had Staff cut Mr. Leek off from his benefits as of March 2010, but they had also refused to give him service credit for his latest elected term running from January 1, 2011 thru the end of 2012.

Mr. Leek's attorney pointed out that the statutes clearly allow for a retired member to return to work and read §24-4-520 (2007) instructing that a member with service credit at a rate of 2:1 could not return to employment in an APERS covered position within 90 days of the person's effective date of retirement or they would forfeit their benefit until the requirements are met. He stated that had the legislators not wanted people to be able to come back to work for a covered position after retirement, it would have been simple to make that policy.

Mr. Wills had no response to any of Mr. Freeland's statements and called his first witness: Mr. Skippy Leek. After he was sworn in by Ms. LeeAnne Dickens, Mr. Wills began his questioning. When he was finished, Mr. Freeland cross-examined Mr. Leek. Upon conclusion, APERS Trustees were encouraged to ask Mr. Leek any questions they might have pertaining to the issue. When the Board members finished asking Mr. Leek questions, Mr. Wills concluded with his redirect of the witness, followed by Mr. Freeland. After one follow-up question from Mr. Gaddy, Staff rested.

Mr. Wills stated although he had announced earlier that all exhibits were all to be admitted by stipulation, he had neglected to request it formally. He that moved for admission of all of Mr. Leek's exhibits as well as all of Staff's exhibits into evidence, as well as the transcripts from the Jo West-Taylor hearing. Judge Jacobs motion to accept the evidence and was seconded by Ms. Wright. Motion passed.

Mr. Freeland called Ms. Gaye Brown as his first witness and she was sworn in by Ms. LeeAnn Dickens. When he was finished questioning her, Mr. Wills briefly cross-examined Ms. Brown. The Board asked several questions directed to Mr. Wills and when they were answered Ms. Brown was dismissed.

Mr. Freeland stated Ms. Brown was his only live witness, but he wished to bring the Board's attention to Judge McElroy's (of Desha County) transcripts and highlighted a few of his answers. When he was finished, Mr. Will's pointed out several parts of Judge McElroy's transcripts that he felt were relevant to the argument.

Mr. Freeland reviewed Ms. Patti Hill's transcripts and Mr. Will's pointed out one item before Mr. Freeland continued with Ms. Taylor's testimony. Mr. Will's declined any further cross examination of Ms. Taylor's testimony.

For his next witness, Mr. Freeland examined the testimony of Mr. Eddy Jones; Mr. Wills had no further questions. Mr. Freeland had no other witnesses and rested his case; Mr. Wills stated he had no rebuttal and unless the Board wished otherwise, both lawyers would give their closing arguments. With no objections from the Board, Mr. Wills gave his closing argument, followed by Mr. Freeland. With that, the hearing part of the meeting was concluded.

Mr. Williams: Board Members... Any questions for counsel? Mr. Vice-Chair.

Mr. Henry: Has Mr. Leek received any money from APERS?

Mr. Wills: Not since May 1st. He had, between the time he had originally retired back in '06 – beginning of '07, I think, but those benefits were terminated effective May 1st, 2010, after we concluded our investigation in the manner into which he had terminated his office.

Mr. Henry: And does he keep that or does he pay that back?

Mr. Wills: We are not. I think that's barred by the statute of limitations that was in effect at that time. If you recall there was a curious provision in APERS' statute of limitations that said that APERS' was prohibited from collecting overpayments if they did not make a claim for those overpayments within one year of the first overpayment having been made. And we did not learn that... or we did not determine, excuse me, that Mr. Leek's benefits should be curtailed until well after that one-year period, and we are not asking for him to disgorge any of those payments that he has already received.

Mr. Williams: Dr. Shelnutt?

Dr. Shelnutt: There was some discussion about the validity of some of the Q&A in the handbook. Is that backed up by...

Mr. Wills: It's not a Board Regulation. What it is is a notice to the prospective retirants and our members, as to what are the effects of the actions that they are contemplating taking. So it is hard to argue legal... I'm getting into a second closing statement and I don't want to do that. It was advisory... It certainly does not have the force of regulation or law.

Mr. Williams: Mayor?

Mayor Northcutt: March 8, 2010 - APERS sent a demand letter of \$75,652.92?

Mr. Wills: Yes Sir.

Mayor Northcutt: So that's what we would actually... and I don't know the term, forgive?

Mr. Wills: Well, I think we are legally prohibited from recovering it. You may recall from the Taylor case, that was our initial demand letter sent to everybody that we identified as potentially... terminated employment improperly. And we made demand for the amounts of money that we had paid to them. However, Ms. Hoggard, in response to a letter similar... identical almost, similar to that... raised the statute of limitations. And Staff... I looked into it, talked to Gail and Mr. Blackard, and we concluded that was probably a correct legal argument. We are not going to argue "red is green" or "black is white" or something like that. If you've got to take a hit - take a hit. But... So no, we are not asking for any of that money back, because I personally believe that the law in effect, at that time, prohibited us from recovering it since we did not make the demand for it within a year of his first... his receiving his first payment.

Mr. Williams: Mr. Gaddy?

Mr. Gaddy: Counselor, I guess I've got a hang up over here on what Mr. Leek was making an application for. It says up here at the top "Application for Retirement Annuity". It doesn't say "Application for Going Off the Payroll Annuity". The handbook here describes... which is given to everyone... I've retired and I remember I kinda read through that, carefully read, what all that meant back when I retired under the APERS program. I've been concerned about where were the county attorneys... where was the legal counsel for the Association of Arkansas Counties in this mix? Did they talk with a person in authority here in this agency for their discussions there? Because, I know... don't know about the county attorneys... I know the one in Union County from the attachments that we received on Mrs. (Jo West) Taylor's hearing here.

The county judge down there was told by his county attorney that they have to vacate the position, and that happened. I'm not sure if it was the tax-assessor or the collector, one of those two positions. The incumbent retired and a deputy was appointed as the interim official. I know that information was transmitted. All the Garland county officials knew about that. I don't know if Desha county officials were aware of that, but I presume from that, that it probably got kicked up to the Association of Arkansas Counties... if they had knowledge of what Union County was doing.

There may have been some deficiencies here that administratively have... are areas that were subsequently clarified, but looking at this form it says "retirement"... is the way I read it. Do you think this includes coverage of withdrawal from employment, or from the payroll?

Mr. Freeland: Yeah, I think... well I'm not sure which form you are looking at but L-1...

Mr. Gaddy: Page 14 in here.

Mr. Freeland: Of Leek? Page 14 of Leek is the "Oath of Office".

Mayor Northcutt: It's this one...

Mr. Freeland: Yeah, it's the same one I'm looking at. Page 14 is the same as L-1. Well, like I said, that's the only one that Skippy signed and what my argument is: This form combined with what he was told by the counselor, which I think I've already argued he has the right to rely on what the counselor said. And then the county judge called up here, Judge McElroy, remember his testimony, he called up here and was told "all you have to do is go off the payroll for 90 days". You didn't need to declare a vacancy; you didn't need to resign. So his county did that.

Now I'm not sure about the timing for Union County. Your memory is correct; Union County did do that. But I don't know what the timing is, but Judge McElroy testified that he did call up here. So combined with what APERS told the county judge, Ms. Brown and Mr. Leek in Desha County... combined with this form that says "my last day to earn pay will be" a reasonable person could interpret that to mean "when I go off the payroll."

Dr. Shelnett: I think you're talking about different forms here... You're looking at a different one than he is.

Mr. Freeland: Well, page 14 is... oh, OK.

Mr. Wills: Let me bring it to him... I'll bring it down. This is more my fault than anyone else's.

Mr. Freeland: It says page A-6 it's our A-16. Bill, what you're looking at is page A-16. It does say page 14 at the bottom and that is... this was signed by Mr. Leek. Statement to Elect... what does it say here on the title... Statement of Elected or Public Safety Service. I may have to put this on the floor so I can read it. Bill, I don't see where you are...

Mr. Gaddy: Well, it's in the next segment down. "If you will be receiving benefits under non-contributory provisions, you must complete this form and return it with your application for retirement annuity." Is this not the application for retirement annuity?

Mr. Freeland: Well, the other one says "application"... The other one I was pointing out to you says the same thing. It says "Application for Retirement Annuity", so there are two documents that say it. The one I was talking about says "my last day to earn pay will be" on that retirement annuity and then the one you have also says "get a retirement annuity"

Mr. Gaddy: It appears though, Counselor, that the word *retirement* in there was overlooked by some of the applicants.

Mr. Freeland: No, I don't think so. And the reason I don't think so is "retirement annuity" means you can collect your retirement as a result of your work. That is your retirement annuity when you go back to work. Because, remember the law says, that you can go back to work in 90 days, or 30 days if you're an employee. So you can be an employee at a covered employer while you collect your retirement annuity. So I think it's consistent with that. The Legislature meant for people to do that to keep older people at their jobs. So *retirement annuity* means what he had earned and what he was going to get paid while he could still continue working for the county. All he could do was not work for that 90 days, and was it clear you had to... what Skippy did was wrong? I say it was not and that's our argument.

Retirement annuity... you could collect that. I mean, Don Zimmerman's collecting it, Larry Fratesi is collecting a retirement annuity and he's still working. I guess Don's still working for the Municipal League, I don't know. (*Nods from table*) He's a good, honest, great guy and he's still working and he's getting his retirement annuity and Larry Fratesi's still getting his retirement annuity. The only difference in what Mr. Leek did and what they did, was Mr. Fratesi didn't go into that office during that 90 days. And Mr. Leek did; he performed the duties but didn't accept the pay.

What I am saying is he should be excused because of misinformation that, I believe, APERS contributed to and there is substantial evidence to that. I don't think the state, you can have estoppel, but when you're a fiduciary I think you have a duty. I think you have a duty to try to give out accurate information. If you didn't, I think you need to take care of your people, the people you have fiduciary duty over.

(*chuckles*) It's not often you get to talk to you across-the-street neighbors in a formal proceeding.

Mr. Williams: Any other questions for council? Board members?

Mr. Henry: I have a question for the counselor. When you said earlier that he couldn't have it both ways... or that we couldn't have it both ways; either he's in or he's out.

Mr. Freeland: Right... right.

Mr. Henry: Well he got out.

Mr. Freeland: He was kicked out.

Mr. Henry: OK

Mr. Freeland: That's the difference, because if you get out on your own, I agree, you shouldn't be able to get it. When you're kicked out, saying you didn't do it properly, you weren't entitled to those benefits, you ought to be able to earn what you're doing for the future work. So we're saying for future work – Skippy Leek's entitled to those credits, because he was kicked out for not doing something in the past. So in the future, you're working and you are entitled to those credits because you were kicked out. If Skippy had said "take me out" I agree with you, you couldn't do that.

Once you start receiving an annuity/benefits and you're not kicked out, you can't go back and get more credits... no question about that. But if you're kicked out, they said you didn't do it properly, then that's no prohibition from *earning*, he's *earning* credits in the future. So we are saying he's earning those credits, unrelated to what's happened in the past. He wouldn't even be asking you to get those credits, if you would do what he asked you to, which is keep him in the system. That's the difference.

Mr. Henry: The reason we could not, is because he got out of the system improperly, according to...

Mr. Wills: Staff.

Mr. Henry: Staff... and Jay, our attorney.

Mr. Freeland: Well, I understand. You're saying it was improperly and that's a legitimate position. But I think it is also a legitimate position that there was misinformation there that was provided by APERS and he relied on that information and is entitled to benefits.

And also, there's no harm to the system. It's the same pool of money he would have gotten if he had not run for circuit clerk again. He would still be collecting the same thing whether he's running for circuit... whether he's operating and working as a circuit clerk, has nothing to do with what he has earned and in the bank at APERS.

And let me... you're talking about this staff and Staff relying on the Attorney General's Opinion... remember I read the answer to Question 4? It's not exactly a ringing endorsement by the Attorney

General's Office when they say *probably no*. Now, how many Attorney General's Opinions have you seen that say *probably no* when asked if you perform the duties is that permissible, and they say *probably no*. You know, I don't see that very often; it's either *yes* or *no*... *probably no* is not exactly something you can hang your hat on, if you're at APERS.

Mr. Williams: Other questions from board members? (*silence*) Counselors have rested, I assume.

Mr. Freeland: We have.

Mr. Wills: Yes Sir. And if you all are getting ready to deliberate, may we be excused from the end of the table... unless you just want to throw something.

Mr. Williams: Is the Board ready to deliberate?

Mr. Henry: As I see it, we have two options... to uphold Staff's recommendations or, what are our options here?

Mr. Williams: To request from counsel... our counsel and the other counsel. What are our options?

Mr. Freeland: Are you asking us to tell you the options?.

Mr. Williams: No, I'm sorry. (*chuckles*) Alright, we've heard the testimony, we've heard the summations by both counsels and it's now in the hands of this board to make a decision. Chair will entertain further discussion or... Dr. Shelnutt?

Dr. Shelnutt: I just wanted to share this case is presented as a unique situation, but is the board vote really talking about precedence that involves possibly a lot of other members, other future cases or past cases in regards to fiduciary responsibility? Does it imply precedence for many more cases?

Mr. Williams: That's a good question. Ms. Shepard?

Ms. Shepard: Well, I think it's clear now. The law, now, I don't think that this will be an issue in the future... because the law is clear now.

Mr. Henry: Regulation 220?

Ms. Shepard: Yeah, well the Legislature passed the law now, I think that it is clear that this, and I think everybody agrees, that the law going forward is very clear. So I don't think that we set a precedence as far as what will happen in the future, because in the future I don't think this will be an issue. I think it is very clear now through the legislative session.

Dr. Shelnutt: So it's not possible to game the system by anything we are considering here?

Mr. Henry: Can we talk about it? Are we going to.. I mean, who's going to speak for... I mean, she has a good point, John does also, but I was thinking from this point on from 220, that we have a clear understanding of what's *termination* and what's not. I think maybe talking about going back to those previous questions that we had, clients or people that were wanting... that were not properly separated at the time. Is that pretty much what we're wanting to do and what you think, maybe?

Dr. Shelnutt: I think it could be a fair number of cases like that, that have already happened, so we may be affecting those. I guess that's what I'm asking... as well as any additional.

Mr. Henry: Well, I sure would think so. The deal with all the clients that we have... that came before us is whether or not they separated properly, and based on Staff, they did not. As well as this client also, did not.

Mr. Gaddy: I thought our internal auditor and the legal counsel here did a pretty comprehensive review and identified, I'm not sure about the Assessor back here, if she was identified along with Mr. Leek or not, perhaps so... probably so, but I think there aren't that many cases. To me, it goes to... you know... we had Ms. Taylor, as part of her submissions had the Union County, and I think we are dealing with the same years here on retirees, which would be what... 2007 or 2006, at the end of 2006... could be wrong on that. If so, someone please correct me, of the members here. But they, Garland County, the county judge acknowledged that he had gotten correspondence from the Union County judge down there, telling him what he was going to do to protect his Quorum Court and make sure that they had properly, legally vacated their positions. And I got the impression it was pretty well shared around the state. I don't think we asked directly was it ever shared at any Association of Arkansas County meetings, but in Garland County, they were well aware of it and we use that as a

pretty key indicator here as to whether they acknowledge termination... the issue of termination was paramount in the process. But, I'm also the oldest member of the Board here (*chuckles*) so you have to take that into consideration... my memory on things here, I might have misstated this, please correct me.

Mr. Williams: I think as we recall, the internal auditor looked at 300 cases and only identified 10... I believe the number was 10, that were suspects. So, Mr. Shelnutt's point, perhaps we have done a good job of looking under every rock in the landscape and identified 10. So perhaps, that's our exposure at this point... as we know it. Only 10.

Mr. Henry: You ready for a motion?

Mr. Williams: Are we still deliberating?

Ms. Shepard: Or are we still just talking about "Did he terminate properly?" or are we talking about both issues?

Mayor Northcutt: I think we need to separate

Mr. Williams: We can take them one at a time.

Ms. Shepard: OK.

Mr. Henry: Well somebody's got to refresh me. On one of them was that he didn't terminate properly and the other one was he wanted to continue credited service. Is that right?

Mr. Williams: That's right, because he was elected to another 2-year term.

Mr. Henry: If we do one, then it will cancel the other one, I think.

Ms. Shepard: No.

Mr. Gaddy: Not necessarily.

Ms. Shepard: I think they are two separate, totally.

Mr. Williams: Let's keep them separate if we can.

Mr. Henry: Well, I make a motion that he did not terminate properly and uphold Staff's recommendation.

Mr. Williams: Mr. Henry has moved we uphold Staff's recommendation in the decision that Mr. Leek did not properly terminate.

Mayor Northcutt: I second that.

Mr. Williams: Second by Mayor Northcutt. Discussion on the motion? (*silence*) All in favor of the motion vote *aye*. (*chorus of ayes*) Contrary *no*. (*silence*) The motion carries.

Mr. Henry: (*unintelligible*)

Mayor Northcutt: How is he reinstated? And then, I guess, the other question I'd have is how was he harmed if he received \$75,000 in retirement payments? I know that there is a statute that he can't pay that back... we've gone through that.

Mr. Williams: Does everyone understand Mayor Northcutt's point?

Ms. Shepard: OK, I have a question.

Mr. Williams: Ms. Shepard?

Ms. Shepard: If we just voted that he did not terminated properly, in my world, that's done – that's gone. So he just didn't do it, so that's what I see happening is...ok. He did not retire properly; therefore he didn't retire; therefore why wouldn't he be entitled to his credited service?

Mr. Williams: Why wouldn't he?

Ms. Shepard: Why wouldn't he? That's what I'm saying... if we're saying then, that he didn't do it properly, fine. I don't think there is any argument, we've had too much testimony all through this, that

this is not the proper way to retire. So it's done; it's gone. I'm struggling a little bit with why wouldn't he just... I almost do think that it's a double penalty if he didn't... Go ahead Janet.

Ms. Harris: No, you finish.

Ms. Shepard: No, I know I'm just babbling, but I'm struggling with... if we all agree that he didn't retire properly, then... then he doesn't have an option B. It's almost like "OK, you didn't do that, now we're doing this." And I'm struggling too, because I do believe that totally in this case... and I'll just speak to this case, that he did, in every regard, whether he did it right or wrong, he had the best intentions. That I am very, very comfortable with, ok... even though, ok, you didn't do it right, I don't think he intentionally did it wrong, and I think it's almost a double slam.

Mr. Williams: Thank you Ms. Shepard.

Ms. Harris: I just want to clarify that the question here is not whether or not his benefits would be reinstated upon our votes, but whether or not he would be entitled to service credit. Is that correct? Because we determined that he did not retire properly from the system. So we can't make the determination that he should begin receiving his benefits again. Is that right?

Mr. Williams: Can we get clarification on that from anybody?

Mr. Wills: That's a fair statement of what you're saying. You've not determined that he did not retire when he fulfilled the termination requirement in connection with his retirement. And so, I think all that is left for you to do, is to determine whether or not as a result of failing to meet those termination requirements, is he entitled with the advent of his new term, to get additional service credit, but no money. I think you're not... is that fair...

Mr. Freeland: Our second position was that he's entitled to service credits for 2011-2012 which when he retires, thus would add 4 years to his service credits, plus the contributions that were made. But he wouldn't get any benefits, you know, during those 2 years, right? So he would just... he would go on like, if the retirement's wrong, then he goes on just like he would have done anyway... get 4 more years of service credit for those 2 years. And his benefit would increase when he retires in 2012 by those 4 years and perhaps his salary also goes up... so it might increase a little more from that, but he would get no benefits from the failed attempt to retire.

Mr. Williams: Thanks for the clarification.

Ms. Harris: I just have one follow-up question for Mr. Wills, if I may? (*nods*) You had mentioned that 24-4-520 of Arkansas law states that the failure to meet requirements shall result in a forfeiture of benefits until such requirements are met. How are... In your estimation, benefits would include the service credit, correct?

Mr. Wills: I would argue that, yes Ma'am. But the law is not explicit one way or the other. It just says... you read it exactly the way it reads

Ms. Harris: So benefits are not explicitly defined under Arkansas law as including service credit?

Mr. Wills: I am not aware of any such definition in the...

Ms. Harris: Thank you.

Mr. Williams: Mayor?

Mayor Northcutt: I'm still going to go back to the \$75,000. What do we do?

Mr. Williams: As I understood counsel, the statute of limitations has run on that. We cannot recoup that amount.

Mayor Northcutt: We cannot collect... but he's received that, so he retired.

Mr. Williams: He did receive that amount, no question about that.

Mayor Northcutt: I guess counsel... Mr. Wills... I'm trying to find an answer for that. What is our answer?

Mr. Wills: I don't think we can substitute our opinion for your discretion. I know what you're asking, but I do not feel comfortable answering, as an advocate, for one side over the other.

Mayor Northcutt: (to Mr. Freeland) Maybe you'll answer it? (laughter)

Mr. Freeland: He received that money, he's lost \$2000 and the rest of 2010-2011... well, he's lost that money if he'd retired properly. Now, if you add back 4 years he'll get, and then if he loses 75... I don't think there's a big difference in the amount of money he's going to be getting in the end, when you look at that. I mean the law says you can't collect the \$75,000 back and to me, it's a fair middle ground. You're stuck with doing that anyways, but it's a fair middle ground; a compromised position to say "Well, I'm going to say he didn't retire properly. We're going to give him his service credits where he comes out closer whole." And I think APERS has some fault in this, so I'm advocating that position as kind of a middle ground. If Mr. Leek gets his service credits for the last 4 years, when you add everything up, I don't think there will be a nickel's worth of difference if he gets his service credits... had he retired properly. So I think that's a fair compromise, because I tell you, I think you have some wrong doing... not personally, but with APERS. The \$75,000 is gone and it's not a legal issue at this point.

Dr. Shelnett: I don't feel comfortable about the numbers here because nobody is really answering that question. We are making comments about being "not far off" but I don't see any numbers to go with anything on costs or savings. I'd have to see the calculations to go with that.

Mr. Williams: Would you like to see the calculations? That kind of begs the question some...just speaking out loud here.

Dr. Shelnett: I don't think we have the ability to do that today.

Mr. Williams: Not at this moment we don't.

Mr. Gaddy: I'm not sure we can do it without reopening the hearing again, can we? What about the years? Can somebody clarify for me here, what about the years... what... '07, '08 and '09 until March 2010... are they now in the service credit calculations here? Would that be an offset for the \$75,000 here that we now... well, no need to get into that. Babbling on here. Are they forever going to be in the future calculations, I guess, is the question we need to, I think, have some bearing on this...

Mayor Northcutt: Maybe it's already been paid?

Mr. Freeland: (unintelligible) ...they're not, he lost those...

Mr. Gaddy: He lost years '07 - '08 - '09 and before March...

Mr. Freeland: He lost all of '10 after March and all of '11...

Ms. Shepard: So all you really ask...

Mr. Freeland: Well, he lost everything: '07 - '08 - '09 - '10.

Ms. Shepard: So all you'd be asking for is '11 - '12.

Mr. Gaddy: So those 4 years will only be the ones? The other years are out of the calculation.

Mr. Freeland: Actually it's 2 years, but 4 years credit.

Mr. Williams: 2 years - '11 and '12.

Ms. Wright: 2 years... this term.

Mr. Freeland: Right.

Mr. Henry: Did somebody else ask for that? Before... last time?

Mr. Gaddy: I don't think we ever reached that issue.

Ms. Shepard: No, I don't think that was the issue before, I don't think. I think all the issue was is whether she terminated correctly.

Mr. Williams: We're still deliberating.

Mr. Henry: I can't see doing any different. (unintelligible) Why are we moving back (unintelligible) do that right, (unintelligible) now this?

Mr. Gaddy: We didn't ask the question. Did the officials in Desha County have notice by receipt of what was considered normal accounting? I don't know if that's a distinction without a difference or not.

Mr. Henry: I guess they've already paid the contributions for those years we've talked about.

Ms. Shepard: No.

Mr. Henry: So are they willing to do that?

Mr. Freeland: We have a letter in the evidence where the clerk who wrote APERS said "Do we make the payments?" and they were told no, but they will make the payments if the entry changes.

Ms. Shepard: Only for '11 and '12. They won't have to go back and make them; it will just be starting '11 and '12?

Mr. Freeland: Right.

Mr. Gaddy: I guess we'll get into this notice issue; sounds like the burden of proof is being shifted to the agency and I'm not sure that's exactly right. I don't know how we measure that, I don't think any current member of the Board here had given any advice to any... and I'm kind of surprised any past ones have been involved in that without referring to the agency here... to tell them... I'm a little troubled by the responsibility being shifted to APERS for saying that we make final determination on termination of offices in elected officials. I don't think we're involved in that process; *shouldn't* have been involved in that process. That is something that should have happened at the county level or the Association of Arkansas Counties... they should have been consulting upstream with the Association, it seems to me, and their legal counsel.

Mr. Henry: Mr. Chair, can we get some numbers on this? We know this \$75,000 has been paid out to the participant. Can we maybe table this and get some numbers? I don't know; I'd like to see some numbers. Can we do that? I mean, who said we have to deliberate today, I mean, make the decision today, unless the Board is ready and clearly we're not. I'd like to see some numbers where it wouldn't be a burden on the system; I wouldn't have a problem making a motion one way or the other. It's just my way of thinking.

Mr. Williams: OK... Chair is going to note your concern. We are not going to table it though, we are going to hold it right there for now as we continue to deliberate.

Judge Jacobs: Dr. John threw out a word there a while ago that really caught my attention and that's setting a precedence. If there are going to be some numbers I think we need some actuarial numbers for the fallout that might come if we rule in favor of Skippy from other people in similar circumstance. I've got a real prejudice here; I think the world of Skippy Leek. We've been on the board for what... 15 years together? Byron, I've known since he was in college and I'd like to do anything I can to help him, but I don't want to do it at the detriment of the retirement system. I think we need to know how much pressure we are actually going to have, because once we let Skippy back into this retirement system, that's what we do... and we are just talking about elected-officials here today, but there's a *lot* of state employees that got out and would like to get back in, and get their years of service back. Just the exposure we are going to have is what I would like to see before I can vote on it.

Dr. Shelnett: Does this imply that any mistake that leads to an improper retirement then falls into this bucket of precedence, into a big financial number, regardless of what combination of factors created it. Even though we say that "it's all fixed" what if it's not, what if something else...

Ms. Shepard: Nothing is ever "all fixed" you know.

Judge Jacobs: (To Ms. Stone) Is that a number that could be... actuaries could come up with?

Mr. Henry: She can talk, but I don't think she wants to talk to me. (*chuckles*)

Judge Jacobs: OK Artee, is that a number that the actuaries can come up with?

Mr. Williams: I think this board can ask the actuaries to do anything. It's within our permit, for sure. So we'll head for that next, so hold that one off some.... Yes, ma'am?

Ms. Harris: Well, I guess just to piggy-back on that, maybe an equally relevant question that might be easier to answer is how often does this sort of thing happen? I mean, this is a very unique circumstance that we know, specifically, will not happen again because of legislation and regulations that have been approved by this board, but how often do we have employees who under 24-4-520 fail to meet the

requirements and would be considered in the same sort of circumstances as Mr. Leek. I mean, is that an easier question to answer than an actuarial study about how much this could potentially cost the system? Just a question...

Mr. Williams: Good question.

Ms. Shepard: I don't think that's been brought up before... has it? At the other hearings... this hasn't been an issue, right? Because, I haven't been at all of them; I was at that very long one.

Mr. Gaddy: Well, we thought they had notice.

Ms. Shepard: Right... right.

Mr. Gaddy: But they should have inquired again since one county took a different course from... I think the same years are involved for... maybe.

Mr. Henry: We just found 10... are we only going for 10 people?

Ms. Shepard: But how many are we dealing with that asked for this question? Because, I think we've... the other 10 we dealt with the exact same way. Am I correct? I mean the other 10 we said "You did not terminate correctly." That's right, right? But how many of those 10, or how many that we have heard, have asked for this circumstance, this exact situation... which OK, if I didn't terminate correctly then can I have, what I've newly been elected to, get the service years for that? I don't think that's come up. If it has, I am not aware of it.

Judge Jacobs: I think it came up under Ms. Taylor.

Ms. Shepard: Did it? I was not... OK.

Mr. Wills: If I may speak and set a correction? What Ms. Taylor requested in the second day of our hearing, that we had convened early in the morning? (*unintelligible*) thing. Her specific request for relief was, that if she was found not to have terminated appropriately, could she be reinstated in the system. (*general agreement*)

Mr. Freeland: That's a different request from what we're making. We're saying that he gets... she, Ms Taylor, was not re-elected so she doesn't have a new term.

Ms. Shepard: She wanted that time back.

Mr. Freeland: We're not asking you to go back in time and reinstate him; we're talking about the future. She couldn't ask for that relief, since she was re-elected. (*unintelligible*) We're not asking for reinstatement of the past; we're asking for future reinstatement, which could come up with her.

Mr. Williams: Again, in this case, we're looking at 2 years of service credit, for the years 2011 and 2012, at 2:1.

Judge Jacobs: Would that be under contributory?

Mr. Wills: That's a question that has not been addressed or answered yet, although there is a statute making new memberships mandatory contributory.

Mr. Williams: That's true.

Mr. Gaddy: On the second day of the Taylor hearing, I think, Judge Jacobs made the motion to, when Ms. Taylor requested what is being requested here, and nobody... he failed to get a second.

Judge Jacobs: That's correct. I remember it very well. (*chuckles*)

Ms. Harris: And I was not here for Ms. Taylor's hearing so I confess that I don't have the full history of that. That wasn't... a different circumstance, if I understand correctly, in that she was requesting prior years and in this particular scenario, he is requesting beginning January 1st, I believe is when county officials are sworn in, forward.. so 2 years - 4 years total service credit. Is that... And I assume any future years he would serve in that capacity.

Ms. Shepard: So it's different that Jo's, in that he's not asking for the time... that 4 year period or whatever it was, so I think it's different in that they're not asking for that. They are asking for the newly elected time. Am I right?

Mr. Williams: Correct.

Ms. Shepard: So they're not asking for what Jo West asked for that day, they are asking for the newly elected time.

Mr. Gaddy: In Ms. Taylor, the only thing they had in common was they were estopped (*unintelligible*) from collecting for the benefits they were paid for that period.

Ms. Shepard: Correct. You're right.

Dr. Shelnutt: Mr. Chairman? Do we need to get a statement from Staff on the precedence that may come out of this? You know we've had board training on Fiduciary responsibility on one aspect of it which was investing; that's recent. But I don't think we've had much training on other types of precedence. Do we need to get a statement on what the implications are?

Mr. Williams: It would seem to be appropriate to get such statement or argument that precedent may or not be set. Would we do that today or is that later? (*unintelligible*)

Mr. Wills: Again, as your... you see, I'm filling in a dual role here; I'm the advocate for the Staff, as well as stepping out of that position, legal advisor to the board. I simply do not feel comfortable filling that dual role, when something that I'm urging, which I'm urging against this obviously, may turn on the advice, no matter how well intended I give it to you. I think that leaves the Board, and certainly me personally, open to criticism on the ethical ground. I find that criticism (*unintelligible*) don't like to purchase any more, if that's alright?

Dr. Shelnutt: It was an innocent question. (*general laughter*)

Mr. Henry: I'd like to make a motion that we table this until we get more information to determine whether or not we want to give him those years of credit; that's my motion and let's move on.

Mr. Williams: Just for clarification, we have taken one action already and that action was that Mr. Leek did not properly retire. Is that correct? (*nods around the table*) So if we table, do we rescind that motion... expunge it... leave it where it is? Board members?

Mr. Henry: My motion is not based on the prior.

Mr. Williams: Not at all?

Mr. Henry: Not at all.

Mr. Williams: I just wanted to make sure I knew where the Board is attempting to do. So that motion, that decision stands: He did not retire properly. Mr. Henry, would you restate your motion again, please?

Mr. Henry: I'd like to make a motion that we table giving him years of credit for 2011 and previous years he wanted, until we get more information and determine the impact on APERS.

Judge Jacobs: I'll second that.

Mr. Williams: That's a proper motion and has been seconded by Judge Jacobs. Everyone understand the motion?

Mr. Gaddy: Well, let me just be the fly in the ointment here. I think we ought to be specific about why we're... what information we need and... before we do something like that. I just feel we need... all the parties need to leave here understanding what we're requesting.

Mr. Henry: I can't speak for everybody, but I can speak for the motion and the reason I'm asking. Earlier, I stated I'd like to see the numbers of the impact it would have on the fund. We're not able to get that right now, so that's my motion. That's the reason I made that motion; does everybody understand the reason I made the motion?

Judge Jacobs: For the potential impact?

Mr. Henry: Right. Do you understand the second motion?

Mr. Williams: Chair will try to restate the motion just for clarity and for those that are recording. Mr. Henry has moved that this Board delay a decision on the request from Mr. Leek to be granted two

additional years of service credit subject to further study that will provide information and answers to the Board regarding the impact, potential impact of granting those two years of service credit.

Mr. Gaddy: You're restricting this to him only. Not other possible...

Mr. Williams: To him only. Right, this relates to Mr. Leek only.

Mr. Gaddy: ... future applicants.

Judge Jacobs: That's Mr. Henry's motion. Mine, well.... I'd like to add to it the potential fall-out from all of this... that would be my preference.

Mr. Williams: And the precedence this may set.

Mr. Henrys: I have no problem with that.

Mr. Williams: Financial impact and the precedence this may set. OK? Everyone understand the motion? We do have a second by Judge Jacobs, correct? (*Judge Jacobs nods*) Discussion on the motion? (*silence*) All in favor, vote aye. (*chorus of ayes*) Contrary, no. (*silence*) Motion carries. Thank you, Board.

Mr. Freeland: Couple legal issues? First, you've made one decision and I'm going to assume that things are in order. My appeal time...

Mr. Wills: What I will do for you is, unless you want me to do it differently, we will hold off in sending you the decision and starting your appeal time running until both matters are resolved... unless you would prefer differently?

Mr. Freeland: No, no, no... that exactly what... I just wanted to make sure we were clear on it. And then the second thing is, if there is going to be additional information, I think legally they have to be discussed in an open meeting.

Mr. Wills: Oh yes... absolutely.

Mr. Williams: This concludes the hearing on the appeal of Mr. Leek.

MEDICAL REVIEW BOARD RECOMMENDATIONS:

The Medical Review Board met at 3:30 p.m. on Tuesday, May 17, 2011 in the APERS Library to discuss two (2) cases: Ms. Tonnie Bordelon and Mr. Jesse McAfee.

- After review and discussion, the Medical Review Board recommended the denial of disability retirement of Ms. Tonnie Bordelon at this time, pending further information.
- After review and discussion, the Medical Review Board found that Mr. Jesse McAfee was suffering from an illness or injury at the time of the member's termination on October 6, 2004, that subsequently led to the disability determination.

Motion by Ms. Wright and a second by Mr. Gaddy, to approve the Medical Review Board's recommendations passed unanimously. With APERS Board approval, in accordance with ACA 24-2-511(e)(3), benefits for Jesse McAfee will be effective June 1, 2011.

NEXT QUARTERLY BOARD MEETING:

The next quarterly meeting of the APERS Board of Trustees is scheduled for Wednesday, August 17, 2011 at 9:00 a.m.

SPECIAL BOARD MEETING:

Ms. Stone suggested the Trustees plan on attending a special meeting to be set sometime in July for reviewing replacement Small Cap managers, as well as, other diversifiers. She would coordinate dates with the Board and let them know when Callan was available.

ADJOURNMENT:

There being no further business, the meeting was adjourned.

MR. ARTEE WILLIAMS, CHAIR

MS. GAIL STONE, EXECUTIVE DIRECTOR