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ATTORNEYS AT LAW

Writer's e-mail: bob@robertdklausner.com

August 12, 2014

Irwin L. Felps, Jr.
Executive Director
Louisiana State Police Retirement System
9224 Jefferson Highway
Baton Rouge, Louisiana 70809

Re: Act 859 of the 2014 Legislative Session
Our File No. 140028

Dear Irwin:

Attached please find, together with correspondence from System Counsel, Denise Akers, our joint opinion concerning the adoption and validity of Act 859 of the 2014 Legislative Session and related issues. The attached opinion reflects the considered opinion of both Ms. Akers and me, following careful research and substantial discussion.

I look forward to meeting with the Board on September 4, 2014 to answer any questions concerning the opinion and the Board's duties regarding the statute.

Thank you for the opportunity to consider this interesting and important question.

Sincerely,

ROBERT D. KLAUSNER

RDK:ldm
cc: Denise Akers, Esquire
System Counsel

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August 12, 2014

Mr. Irwin L. Felps
Executive Director
Louisiana State Police Retirement System
9224 Jefferson Highway
Baton Rouge, LA 70809

Re: Louisiana State Police Retirement System
Our File No.: 09-1154

Dear Irwin:

Enclosed please find the final opinion letter from Bob Klausner and myself.

With kindest regards, I remain

Sincerely,

AKERS & WISBAR, LLC

Denise Nelson Akers

DNA/ejk
Enclosure

Cc: Bob Klausner

MEMORANDUM

TO: Mr. Irwin L. Felps, Jr., Executive Director
Louisiana State Police Retirement System

FROM: Denise Nelson Akers, General Counsel and Robert D. Klausner, Special Counsel

DATE: August 12, 2014

RE: Act 859 of the 2014 Louisiana Legislative Session

You have requested an opinion from us regarding Act 859 of the 2014 Louisiana Legislative Session (hereinafter referred to as "Act 859"). We address the following points in this letter:

1. Our evaluation of Act 859;
2. The effect of the renunciation of rights by Edmondson and Boquet, if received;
3. Potential remedies;
4. Our recommendation.

A. CONCERNS REGARDING ACT 859 OF THE 2014 LOUISIANA LEGISLATIVE SESSION

Act 859 began as SB 294. The Bill's title is:

LAW ENFORCEMENT. Provides relative to rights of law enforcement officers while under investigation.

Its Digest summarizes the effect of the Bill:

Present law provides for minimum standards which apply while certain law enforcement officers and police employees are under investigation.

Proposed law provides that present law shall not apply to investigations of alleged criminal activity nor shall the existence of any investigation of alleged criminal activity in any way affect investigations subject to present law.
(Amends R.S. 40:2531(A) and (B)(7))

The House offered amendments to the Senate's bill, so the bill was sent to Conference Committee, as per regular legislative protocol to attempt to compromise on the final changes submitted by the House.

Section 2 of this bill is the language which affects the Louisiana State Police Retirement System ("LSPRS"). Section 2 of this bill was not proposed in either the House or the Senate. This section was added during conference committee. The conference committee members were appointed by the House and the Senate on June 1, 2014. On June 2, 2014 the conference committee issued its report, which included this new Section 2. Also on June 2, 2014, both the House and the Senate adopted the report and the Speaker of the House and President of the Senate both signed indicating its passage. Monday June 2, 2014 was the day of final adjournment for the legislature. It was signed into law by Governor Jindal on June 23, 2014.

Section 2 only impacts Col. Edmondson and Mr. Louis Boquet. Our concerns regarding this Act are the following:

1. Section 2, which was added to provide this retirement benefit, does not meet the constitutionally required "one object" requirement of La. Const. art. III, § 15(A).

2. Section 2 does not meet the germaneness requirement of La. Const. art. III, § 15(C).

3. No notice was provided as required by the constitution for retirement related bills and the bill itself never indicated that proper notice was given, all in violation of the La. Const. Art. X, § 29.

4. The source of funding for the benefit is the Employee Experience Account, which is reserved as the source of future cost of living benefits and payments toward the unfunded accrued liability.

We amplify the above concerns as follows:

1. **Section 2 of Act 859 of the 2014 Louisiana Legislative Session did not meet the "one object" requirement of the Louisiana Constitution**

In our view, Section 2 of Act 859 violates the one object rule of La. Const. art. III, § 15(A), which reads as follows:

> A. *Introduction; Title; Single Object; Public Meetings.* --The legislature shall enact no law except by a bill introduced during that session ..... Every bill, ..., shall be confined to one object. Every bill shall contain a brief title indicative of its object. Action on any matter intended to have the effect of law shall be taken only in open, public meeting.

La. Const. art. III, § 15(A) requires that all the parts of the bill should be reasonably related and have a natural connection to the general subject matter of the legislation. The object of a bill is "the aim or purpose of the enactment; its general purpose; or the matter or thing forming the groundwork of the bill." In re Rubicon, supra, 479. To make this analysis, one first must look at the bill to determine its purpose.

Even though section 1 and section 2 of the Act purport to affect law enforcement, that is an insufficient connexity to meet the one object rule. The fact that both sections of a bill even deal with the same state agency is an insufficient connection to meet the one object rule. In re Rubicon, supra. In Act 859, Section 1 dealt with rights of law enforcement officers under investigation, the scope indicated by the title of the bill. Section 2 dealt with the provision of an additional benefit to certain members in LSPRS. The purpose of La. Const. art. III, § 15(A) is to restrict the content of any one bill in order to prevent a legislator from having to consider two or more unrelated matters when deciding how to vote on a single bill. In re Rubicon, No. 95 0108 (La. App. 1 Cir. 02-14-96); 670 So. 2d 475, 479, Doherty v. Calcasieu Parish School Board, 93-3017 (La. 4/11/94); 634 So. 2d 1172, 1175-1176. That purpose was thwarted by the form in which Act 859 was presented to the legislators.

The legislators were not even on notice regarding the fact that Section 2 dealt with an LSPRS retirement issue because the bill's title never included that reference. Where the title clearly expresses the object of the bill, and a portion of the bill does not fit within that title, that portion is void for violation of the one object rule. Orleans Parish School Board v. City of New Orleans, 410 So.2d 1038 (La. 1982); In re Rubicon, supra. The title of the bill reads as follows:

LAW ENFORCEMENT. Provides relative to rights of law enforcement officers while under investigation. (8/1/14).

That title clearly does not encompass an award of a retirement benefit.

2. **Section 2 does not meet the germaneness requirement of La. Const. art. III, § 15(C).**

La. Const. art. III § 15(C) is a separate and distinct constitutional requirement from that of La. Const. art. III § 15(A) and dictates that all amendments shall be germane to the original bill contents.

> C. *Germane Amendments.* --No bill shall be amended in either house to make a change not germane to the bill as introduced.

To determine whether an amendment is germane to the subject matter of the original bill, one must determine whether the new matter could have been incorporated in the original act, under its title. A & M Pest Control Service, Inc. v. LaBurre, 247 La. 315, 170 So.2d 855 (1965).

In Act 859, the original bill sought to amend Title 40:2531 relative to law enforcement officers' rights under investigation. The bill's title indicated this subject matter. The amended Section 2 sought to amplify retirement benefits to certain State Police officers, which retirement benefits are provided for under Title 11:1301 et seq.[1] These sections are not in close relationship nor

[1] It is interesting to note that, because of the way the amendment was offered, not particularly amending a particular statute, the legislators were not on notice that Section 2 was a new law, because it was not in boldface and underscore, as the legend of Act 859 indicates would be done to any additions to existing law.

pertinent to one another and the bill's title never reflected that retirement benefits were impacted by its text.

3. **Proper constitutional notice of this retirement bill was not provided**.

La. Const. Art. X, § 29(C) requires that, for all retirement bills, notice must be given at least 60 days before the bill is introduced.

> C. *Retirement Systems; Change; Notice.* --No proposal to effect any change in existing laws or constitutional provisions relating to any retirement system for public employees shall be introduced in the legislature unless notice of intention to introduce the proposal has been published, without cost to the state, in the official state journal on two separate days. The last day of publication shall be at least sixty days before introduction of the bill. The notice shall state the substance of the contemplated law or proposal, and the bill shall contain a recital that the notice has been given.

The purpose of this provision is to place the public, including the affected retirement system, on notice that a provision affecting the retirement system is going to be debated so that all those interested in supporting or opposing such a revision can be present in the committee discussing this bill and notify their respective legislators of their support or opposition. There was no such notice. The notice must state the substance of the contemplated law, and not simply that some bill affecting LSPRS might be presented.

In addition, this constitutional provision requires that the bill itself clearly designate in its contents that notice of this retirement provision was publicized according to the constitutional requirement. No version of this bill, not even the version presented to the conference committee, nor to the House nor the Senate, contains this language. This is a constitutional defect as well.

Our opinion does not address the advisability or feasibility of the subject of Section 2 of Act 859. The wisdom of legislation is a matter solely within the

> acts performed under it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it because only the valid legislative intent becomes the law to be enforced by the courts.

As a result, it is our recommendation that the System simply decline to pay any benefit under Act 859. If that is later challenged, it would fall to the Attorney General to defend the law, rather than expending System resources to pursue a costly declaratory relief action. In the event that the Attorney General defends the validity of the law, under that circumstance, the Fund should enroll and seek a declaration of the Act's validity. The Louisiana Supreme Court in the recent Retired State Employees v. State, supra decision made it clear that a pension law adopted in violation of constitutional requirements is void and of no effect. The benefits to this approach are the litigation savings to the system. This issue would only need to be litigated if someone benefitting from the Act filed to enforce it. Both gentlemen benefitting from the act have indicated they do not desire to enforce it. Thus, LSPRS may incur no litigation cost in this matter.

It is our view that pursuit of a declaratory relief or other legal action seeking to declare Act 859 invalid is unnecessary. By determining that it will not enforce the Act, the Board acts consistent with its fiduciary duty under R.S. 11:261, et. seq.

E. Procedural Matters

A question has been raised as to whether any members of the Board are precluded from voting on this matter. Clearly, Colonel Edmondson is precluded from voting based on the prohibition contained in R.S. 11:1112 as he is a direct beneficiary of Act 859. The other elected members of the Board are not prohibited from voting precisely because they cannot benefit from the subject legislation. R.S. 42:1102 (c) excludes a public employee's salary and benefits from the definition of a "thing of economic value." In the case of a specific individual's benefit, however, the Louisiana courts have held the Ethics Law would require recusal. In City of Baton Rouge v. Commission on Ethics, 655 So.2d 457 (La. App. 1 Cir. 1995), elected members of the board of trustees of the Employees' Retirement System of the City of Baton Rouge and Parish of East Baton Rouge who were participants in the DROP were precluded from setting the DROP interest rate because an improvident rate that benefitted the few could adversely affect the security of the retirement plan. In the present

circumstances, the other trustees have no interest in Act 859 benefits and have a statutory duty to prevent erosion of the plan assets as a whole.

This view is consistent with jurisprudence in our sister states interpreting similar statutes. In a similar setting, the Supreme Court of California found that its comparable ethics statute did not prohibit employee trustees from voting on matter of general effect to the retirement plan as a whole. Lexin v. Superior Court, 222 P.3d 214 (Cal. 2010). It is clear that the Louisiana Legislature intended there to be stakeholder participants on the Board of Trustees. Each stakeholder was known to benefit from the System upon retirement. It is precisely why the retirement benefits were excluded from prohibited transactions in R.S. 42:1102(c). Accordingly, other than Colonel Edmondson, no other member of the Board of Trustees has a conflict of interest which would prohibit their participation.