



## MEMORANDUM

Date: July 25, 2019

To: Local Governmental Employees' Retirement System Board of Trustees (LGERS Board)

From: Patrick Kinlaw, Director of Policy, Planning, and Compliance

**Re:** Affirmation of "Date Set by the Board of Trustees" Consistent with the Board's Policy Pursuant to N.C.G.S. § 128-30(g)(3) for a Particular Employer Contribution, and Contingent Authorization for Interim Director of the Retirement Systems to Notify State Treasurer and Office of State Budget Management If Contribution Remains Delinquent after a Certain Date

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### Background

Johnston County incurred a liability for an additional contribution of \$108,363.29 to LGERS when an employee retired effective December 1, 2017, because the retirement allowance exceeded the contribution-based benefit cap (CBBC).

On November 15, 2017, LGERS sent Johnston County a letter notifying it of the liability. On January 9, 2018, October 19, 2018, April 5, 2019, and June 19, 2019, LGERS sent Johnston County letters notifying it that the liability remained due. LGERS has not yet received payment.

Pursuant to N.C.G.S. § 128-30(g)(3), in the event an employer fails to submit payment of the required CBBC contributions to the Retirement System within 90 days after the date set by the Board of Trustees (Board), the Board is required to notify the State Treasurer and the Office of State Budget Management (OSBM) as to the default of the employer. Upon such notification, OSBM is required to withhold State appropriations to the employer and forward such amounts to the Retirement Systems Division (RSD) of the Department of State Treasurer, as a means of collecting the delinquent contributions.

In a letter dated June 25, 2019, Johnston County informed RSD that the county objects to the assessment of the liability and declines to pay the assessed amount. As described in the letter, the county's objections relate to the fact that the liability was first assessed on November 15, 2017, before the Board of Trustees' administrative rule related to the "cap factor" became effective on May 1, 2018. The county maintains that the assessment was invalid, and that use of the cap factor represents an impermissible retroactive application of an administrative rule.

In response, RSD issued a Final Agency Decision letter to Johnston County dated July 11, 2019, stating that the assessment is required by the laws governing LGERS and will not be withdrawn. The statutes which enacted the cap factor state that it must be applied to all retirements that occurred on or after January 1, 2015. (N.C.G.S. § 128-27(a3), 128-30(g)(2)b.)

Johnston County may petition the Office of Administrative Hearings for a contested case hearing to appeal the Final Agency Decision, or may seek an injunction to prevent RSD or OSBM from taking action to withhold State appropriations.

### **Date Set by the Board**

According to Part (1) of the Board's policy adopted at its January 31, 2019, meeting: "Effective January 31, 2019, the Board establishes the 'date set by the Board of Trustees' to intercept delinquent CBBC contributions to be the later of May 1, 2019, or twelve months after the member's effective date of retirement."

Pursuant to this policy, for a CBBC contribution arising from a retirement effective December 1, 2017, the "date set by the Board" is May 1, 2019. Therefore, based on this policy the Board would notify the State Treasurer and OSBM of the delinquent contribution if the employer fails to submit payment within 90 days of May 1, 2019. Accordingly, the Board must provide the required notice if the employer has not made payment by July 30, 2019. In its June 19, 2019, letter to Johnston County, LGERS informed the county of the payment deadline of July 30, 2019. Consistent with the Board's policy, the Board may affirm the "date set by the Board" for this particular contribution, before proceeding with notification and the potential withholding of State appropriations.

### **Contingent Authorization**

If the Board affirms that the "date set by the Board" is May 1, 2019, then the Board may clarify that it is authorizing the Interim Director of the Retirement Systems to notify the State Treasurer and OSBM and request interception of State appropriations, on the Board's behalf, if payment is not submitted by July 30, 2019.

### **Example Motion to Affirm Date Set by the Board and Provide Contingent Authorization**

"Consistent with the Board's policy, move to affirm that the 'date set by the Board of Trustees' under G.S. 128-30(g)(3) is May 1, 2019, for payment of a contribution-based benefit cap liability due to a retirement that became effective December 1, 2017; and that if payment of such liability is not submitted to LGERS within 90 days of that date, the Interim Director of the Retirement Systems shall issue the notifications required by G.S. 128-30(g)(3) with regard to that delinquent contribution on the Board's behalf."