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TO: Mitzi Johnson, Speaker of the House
Tim Ashe, President Pro Tempore
Senator Jane Kitchel, Chair, Senate Committee on Appropriations
Senator Jeanette White, Chair, Senate Committee on Government Operations
Representative Kitty Toll, Chair, House Committee on Appropriations
Representative Sarah Copeland-Hanzas, Chair, House Committee on Government Operations
Susanne Young, Secretary of Administration

FROM: Beth Pearce, State Treasurer

DATE: January 15, 2020

RE: Law Enforcement Retirement Benefits Study Committee – Progress Report

In 2019, the General Assembly created the Law Enforcement Retirement Benefits Study Committee (Committee) in Act 25. The Committee's purpose is "to evaluate the requirements for, and make recommendations on, membership in Group C of the Vermont State Employees' Retirement System." 2019 Acts & Resolves No. 25, Sec. 4, Subsec. (a).

Per Act 25, the Committee is made up of 10 members, and as State Treasurer, I serve as Chair. The General Assembly tasked the Committee with providing a final written report, including recommendations, by January 2021. In the interim, the General Assembly directed that the Committee provide a progress report by January 2020.

I write today to update the General Assembly and Administration on the Committee's work since the passage of Act 25.

VSERS Group C

The Vermont State Employees' Retirement System (VSERS) includes Group C, which is specifically reserved for state employees in law enforcement and firefighter positions. The specific positions in Group C are set forth in 3 V.S.A. § 455(a)(9)(B) and (a)(11)(C), and include the following positions:

- Employees of the Department of Public Safety, Department of Liquor Control, and Department of Fish and Wildlife assigned to law enforcement duties;
- Motor vehicle inspectors;
- Deputy sheriffs paid by the State of Vermont whose primary function is transports;
- The Capitol Police force;

- Certain investigators employed by the Criminal Division of the Office of the Attorney General, Department of State's Attorneys, Department of Health, or Office of the Secretary of State; and
- Full-time firefighters employed by the State of Vermont.

The eligibility criteria and retirement benefits for VSERS members are summarized in Appendix A to this Progress Report. While not an exhaustive comparison, Appendix A illustrates how Group C compares to the other Groups in the State Plan. By way of reference, Group A is a closed Group with only a handful of active employees. Group D is reserved for judges only. And Group F is the open Group to which most of the State's active workforce belongs.

The main features of Group C can be summarized as follows:

- The normal retirement age for Group C members is 55.
- The early retirement age for Group C members is 50, provided the member has 20 years of service. Unlike other groups, there is no reduction in retirement allowance for early retirement for Group C members.
- Group C members vest after 5 years for retirement and disability benefits, and after 10 years for death-in-service benefits.
- Group C members' survivors receive have a higher death-in-service benefit (70 percent of member's accrued benefit) than other groups.
- The retirement benefit for Group C members is based on the member's highest two consecutive years of salary (average final compensation or AFC), and it is capped at 50 percent of the member's AFC.
- Perhaps the most unique aspect of Group C is that the normal retirement age of 55 is also a mandatory retirement age. This mandatory retirement age is a focus of the Committee's review.

Act 25 Creation of the Committee

As noted above, the Committee was established to review the Group C membership requirements. Specifically, the Committee was tasked with addressing the following questions:

1. Whether the requirements for membership in Group C are tailored to provide the appropriate retirement benefit to the appropriate group of employees. This analysis shall include identifying all law enforcement positions that are currently in Group C and all law enforcement positions that are in another Group.
2. Whether applicable federal requirements, including the provisions of Age Discrimination in Employment Act, merit changes to the requirements of Group C. This shall include an evaluation of any possible changes to mandatory retirement ages as well as whether the specified positions are appropriately subject to a mandatory retirement age.

After performing the necessary review and analysis required by Act 25, the Committee is directed to make recommendations as to the following:

- Whether any State positions currently in Group C should be reclassified to another Group within the Vermont State Employees' Retirement System, given the nature of the job duties performed by members in such positions;
- Whether any State positions not currently in Group C should be reclassified into Group C, given the nature of the job duties performed by members in such positions; and
- Whether the General Assembly should consider any revisions or enhancements to the retirement benefits for certain State positions that do not qualify for the current or recommended Group C requirements, or reclassification of State positions, where the nature of the position and job duties performed merit such revisions.

The Committee

In late summer 2019, following the passage of Act 25, appointments were made to the Committee, which is made up of the following individuals:

- State Treasurer Beth Pearce, Chair
- Sen. Jane Kitchel (Senate Appropriations)
- Rep. Maida Townsend (House Appropriations)
- Sen. Jeanette White (Senate Government Operations)
- Rep. John Gannon (House Government Operations)
- Roger Dumas (Vermont State Employees' Retirement System)
- Commissioner Beth Fastiggi (Department of Human Resources)
- Major Ingrid Jonas (Department of Public Safety)
- John Federico (Vermont State Employees' Association)
- Michael O'Neil (Vermont Troopers' Association)

The full Committee met three times in 2019, in August, September, and December. In between the September and December full Committee meetings, subcommittee meetings were held to review the job specifications for all Group C members.

Progress Report

I am pleased to report that the Committee has made significant progress in the months since its creation, and it is well positioned to conclude its work during the next year.

Mandatory Retirement Age

To date, the Committee has focused its efforts on the question of whether members currently in Group C are appropriately subject to mandatory retirement under the federal Age Discrimination in Employment Act, or ADEA. Under the ADEA, it is generally unlawful to require an employee to retire based on the employee's age unless the employee falls within certain categories. One such category is for law enforcement officers and firefighters. 29 U.S.C. § 623(j). Accordingly, the Committee is in the process of conducting a review of all Group C law enforcement positions to

determine whether those positions fall within the ADEA's law enforcement exception.¹ To perform this review, the Committee has identified all positions with employees currently in Group C and compiled the job specifications set forth by the Department of Human Resources.

The Committee has also reviewed the legal definition of the term "law enforcement officer," and based on this review, established a working definition to use in evaluating existing positions. The Committee's working definition of "law enforcement officer" is as follows:

An employee who is certified by the Criminal Justice Training Council and whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the State, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The working definition is generally derived from the federal definition of "law enforcement officer" set forth in the ADEA, which can be found at 29 U.S.C. § 630(k). In addition to adopting this working definition, the Committee also reviewed and adopted a series of factors to use in evaluation of existing positions. These factors were derived from a similar statutory definition of a "law enforcement officer" in the federal retirement systems (5 U.S.C. § 8331(20)), as well as associated regulations and caselaw.² Factors include, among other things, whether the position has frequent direct contact with criminal suspects, is authorized to carry a firearm, works for long periods without a break, is physically demanding, etc.

The Committee delegated the substance of the review to a subcommittee made of five Committee members. The subcommittee's first task was to take an initial pass through all of the Group C job specifications to determine whether it could reach a preliminary conclusion that the position is likely to meet federal law enforcement officer definition based solely on a review of the position's job specifications. This review has been completed and significantly reduced the number of positions in need of further review.

In order to better evaluate those positions in need of further review, the subcommittee has developed a brief questionnaire and intends to engage with the respective appointing authorities in early 2020.

Once the subcommittee's review is complete, it will present its analysis to the full Committee for its review and will likely submit a summary of its work and its conclusions for review by outside counsel, as envisioned by the Committee's enabling legislation. The purpose of the review by outside counsel is not to recreate the work of the Committee, but instead to have an outside check on the reasonableness of the Committee's process and analytical framework. At that point, the Committee will be in a position to make recommendations.

¹ Firefighters are not included in the instant review as they are outside the scope of Committee's charge to evaluate law enforcement personnel and they are subject to their own exception under the ADEA.

² See 5 C.F.R. § 831.902; *Bingaman v. Department of Treasury*, 127 F.3d 1431, 1436 (Fed.Cir. 1997); *Watson v. Dept of Navy*, 262 F.3d 1292, 1300-01 (Fed.Cir. 2001). For a more general discussion of the topic, please see Katelin P Isaacs, Congressional Research Service, *Retirement Benefits for Federal Law Enforcement Personnel* (Sept. 5, 2017), at p. 1-3, available at <https://fas.org/sgp/crs/misc/R42631.pdf>.

At the same time, the Committee is in the process of scheduling meetings with stakeholders representing those employees not currently in Group C, but who believe they should be considered for inclusion in Group C. After hearing from these stakeholders, the Committee will conduct a review similar to the one conducted for current Group C members. Following this review, the Committee will make a determination as to whether to recommend one of the following:

1. that the position(s) be moved to Group C;
2. that the position remain in Group F, but with certain exceptions (e.g., a specific carve-out that removes an early retirement penalty, as is the case now for Corrections Officers); or
3. no change.

Other work

The Committee has also begun to research and compile information on law enforcement retirement benefits, both at the federal level and in other states and municipalities. The focus of this work has been to evaluate Vermont's mandatory retirement age of 55 and compare that age to mandatory retirement ages in other jurisdictions.

Additionally, the Committee has heard from a County Sheriff regarding concerns about the retirement benefits afforded to their employees. Only a small subset of deputy sheriffs is included in VSERS Group C (state-funded transport deputies). For other deputies, some are included in VSERS Group F or in the Vermont Municipal Employees Retirement System (VMERS) depending on the election made by the Sheriff. In this way, the issue of retirement benefits for County Sheriffs' Offices is complicated and not squarely within the scope of work assigned to the Committee. Nevertheless, the Committee intends to continue its dialogue with the State's Sheriffs to determine whether there are any consensus solutions to the concerns raised by the Sheriffs. The Committee and the Treasurer's Office will bring those issues to the Committees of Jurisdiction.

Next Steps

Generally speaking, the Committee intends to complete its review of positions in the first quarter of 2020. This includes the review of positions currently in Group C and whether any such positions are recommended for a change in Group membership. It also includes positions that are not currently in Group C, but which may be considered for inclusion going forward.

Following this review, the Committee intends to turn its attention to the mandatory retirement age of 55 and determine whether to recommend any changes to that specific retirement age. The Committee anticipates the bulk of this work to take place in the second and third quarters of 2020.

Conclusion

To date, I am very pleased with the progress that has been made by the Committee in completing its assigned review. While we have significant work ahead, I believe that we are well-positioned to complete our work in advance of the next Biennium.

For more information about the Committee and to access the agendas and minutes from the meetings, please visit the Treasurer's Office website by using the following link:

<https://www.vermonttreasurer.gov/content/law-enforcement-retirement-benefits-study-committee>