1997-98 SESSION COMMITTEE HEARING RECORDS

Committee Name:

Joint Survey Committee on Retirement Systems (JSC-RS)

Sample:

- Record of Comm. Proceedings
- 97hrAC-EdR_RCP_pt01a
- 97hrAC-EdR_RCP_pt01b
- 97hrAC-EdR_RCP_pt02

- *Appointments ... Appt*
- *Clearinghouse Rules ... CRule*
- *Committee Hearings ... CH*
- *Committee Reports ... CR*
- *Executive Sessions ... ES*
- *Hearing Records ... HR*
- *Miscellaneous ... Misc*
- *97hr_JSC-RS_Misc_pt07b*
- *Record of Comm. Proceedings ... RCP*

Hearing 5-27
Sub. Comm.

State of Wisconsin \ JOINT SURVEY COMMITTEE ON RETIREMENT SYSTEMS
AND THE RETIREMENT RESEARCH COMMITTEE

BLAIR L. TESTIN
RESEARCH DIRECTOR
ROOM 316, 110 E. MAIN STREET
MADISON WISCONSIN 53703
(608) 267-0507
FAX (608) 267-0675

May 14, 1997

TO: Dept. Of Employment Relations - Jessica O'Donnell
Wisconsin Counties Association - Mark O'Connell
Alliance of Cities - Gail Sumi
Professional Firefighters of Wisconsin - Mark Zeier
Wisconsin Professional Police Association - Steve Urso
Wisconsin State Employees Union - Marty Beil

FROM: Blair Testin, Consultant for the RRC/JSCRS BT

RE: **40.65 PROGRAM DISCUSSIONS**

The Retirement Research Committee Protective Study Subcommittee met on Monday, May 12, 1997, to review the s. 40.65 duty death and disability program for protectives. The Subcommittee heard testimony from staff of the ETF and the Legislative Audit Bureau. This meeting was primarily a review for Subcommittee members, and interested parties were not invited to testify.

The Protective Study Subcommittee is tentatively scheduled to meet again during the afternoon of Tuesday, May 27, 1997. Senator Grobschmidt and Representative Klusman, Co-Chairs of the Retirement Research Committee, request that the above parties of interest provide their input on four of the presumed problems that were addressed in the ETF memo prepared by Robert Weber. An excerpt from that memo reflecting the four areas of concern are enclosed for your information.

It would be helpful if you could prepare a written statement in advance on your views relating to these areas so that such responses could be mailed to Subcommittee members before the meeting.

If you are able to provide a written statement, please send it to this office. If you have any questions on this request, please contact this office.

Enc.

cc: Senator Grobschmidt
Rep. Klusman

State of Wisconsin \ JOINT SURVEY COMMITTEE ON RETIREMENT SYSTEMS
AND THE RETIREMENT RESEARCH COMMITTEE

BLAIR L. TESTIN
RESEARCH DIRECTOR

ROOM 316; 110 E. MAIN STREET
MADISON WISCONSIN 53703

(608) 267-0507
FAX (608) 267-0675

May 21, 1997

TO: Members of RRC Protective Study Subcommittee

FROM: Blair Testin, RRC Consultant

RE: Next Meeting Discussions

As you are aware, a meeting of the RRC Protective Study Subcommittee has been scheduled for Tuesday, May 27, 1997 at 1:30 p.m. in The North Hearing Room of the State Capitol.

At the last meeting of the Subcommittee, the Legislative Audit Bureau reported on s. 40.65 program issues, and an ETF memo prepared by Rob Weber was reviewed. The Subcommittee determined that the next meeting should concentrate on the four primary problem areas referred to in the ETF memo.

These four problem areas were submitted to employer and employee parties of interest with the request that they present their views on these issues at the next meeting. I am enclosing a copy of the four problem areas referred to in the ETF memo for your information. As of this time, no written statements from interested parties have been submitted to this office.

If you have any questions or concerns with this meeting, please contact the RRC office.

BT:db

Enc.

WISCONSIN PROFESSIONAL POLICE ASSOCIATION

TO: Members of the Protective Study Subcommittee

FROM: Steven J. Urso, WPPA Executive Assistant

DATE: May 21, 1997

RE: 40.65 Program Discussions

Ladies and Gentlemen:

Thank you for the opportunity to communicate with you on the variety of issues raised concerning the duty disability program. We are interested in the program functioning in the very best interests of everyone involved. Obviously, we have a bias on behalf of the individuals applying for benefits, and we are certain you will be able to see very early on in our communication that our desire is to see very limited changes made to the current program. We have reviewed Mr. Weber's memorandum dated May 12, 1997, and we do have some responses.

In Problem A, we dispute the accuracy of his contention that "benefits are essentially the same regardless of how severe the disability may be." We believe Mr. Weber is wrong in his statement. In order to receive 40.65 benefits, an applicant must be permanently, 100 percent disabled from working as a protective. Section 40.65(4)(b)(c), Wis. Stats., is used to determine entitlement to benefits. The statute, we believe, requires the disability to be "permanent" and the disability "causes the employee to retire." We believe Mr. Weber was referring to the injury or illness versus the disability in his memorandum, and it is correct that injury can be evaluated differently depending upon severity but not in cases involving 40.65 duty disability benefits.

For remedy under Problem A, a recommendation is made to tie benefits to degree of disability. Again, we point out, to receive the benefit one must be 100 percent disabled from protective service. Further, when a person leaves service due to disability, the law presumes the injury or illness is permanent. The recommendation of counsel suggests recovery from injury is possible. We believe the doctors have indicated by signing the application that it is very unlikely if not impossible. Further, we suggest that as disabled persons age, their injuries are far less likely to improve. We believe most cases are individual in nature and require appreciation and understanding of the individual's ability to deal with the injury or illness and therefore does not allow us the ability to generalize and lump every case into broad categories of rating in terms of degree or percentage of disability.

To us, the Department of Employe Trust Funds (DETF) is directed to administer the statutes and should not be put into the business of determining degree of disability. The physicians, by signing the necessary medical verification reports, have already made the determination that the employee is disabled and should retire. That to us is the single determination necessary.

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The issue of Wis. Stats. 40.63(4) in combination with 40.65 involves, to us, a matter of interpretation that DETF has created. Rather than resolve DETF's administrative issues, we prefer to respond directly to the larger issues raised by the Legislative Audit Bureau Report.

Problem B, as related in Mr. Weber's memorandum, creates some interest on our part. Previously we proposed periodic medical reexamination. We have done so believing that this is unnecessary and of limited value because either the employee is or is not "permanently" disabled. That decision is for a physician to make. The statute says "likely to be permanent." To us, that means permanent. Usually injury occurs and a period of treatment follows. After surgery, in some cases, an evaluation is made by the physician of the permanency of the injury and of the limitations or lack thereof that will exist permanently. After evaluation and determination of permanency is when the important decision to apply is really made. Up to then, no final decision is possible, and once the permanency issue is decided, the physician plays the pivotal role of determining whether or not retirement is necessary.

The entire issue raised concerning the disability ceasing, to us begs the question. The law says the injury needs to likely be "permanent." To a reasonable degree of medical certainty, a pair of physicians is certifying a permanent injury exists that requires retirement. Further, assuming we see this change to the statutes, can the no-longer-disabled employee be returned to his or her former position and rank? Will the statutes be changed to reflect full rights of reemployment? Consider that many employers have finite resources and staff is already short. Can the employer afford to hold a slot open on a chance, or is it more responsible to depend upon the assessment of a licensed medical practitioner?

We believe the matter of termination of benefits upon return to work appears to already be addressed in the statutes. Specifically, offsets are in place for income earned by 40.65 recipients. It seems in arguing to cut the benefit, we are on the one hand trying to encourage people to return to work and use their skills, but simultaneously we want to penalize them for obtaining another job. We believe this thinking indicates we have lost sight of our goal to ensure that people who are injured and can no longer perform their jobs are not cast aside. It seems wise for us to consider ways to provide incentives for persons to find employment as soon as possible. If that requires education and training, we recommend concentrating on finding ways in which to get that accomplished. One final thought in this area comes from the employer's perspective. Why would an employer take the risk of hiring a 40.65 recipient into another protective employment role? Why not escape any liability that may accrue and hire only persons who are without physical or mental limitations? Today, employers routinely appear before the legislature to complain about the impact they are suffering from lost hours of work by employees. How does hiring a disabled person back into the protective service lessen the burden employers now claim to have?

Problem C, as written, shows to us the lack of appreciation DETF has for the complex nature of circumstances that surround duty disability. The law requires one to resign from employment. How adjusting the amount of benefit in relation to the severity of injury changes the fact one must still retire and forego all pay and benefits does not make sense. The whole purpose behind providing the benefit is to no longer have a permanently disabled worker in a protective service position. The severity of the injury is not at issue; the ability of the employee to adequately perform the job in order to protect and serve the public is the issue. Once an initial determination is made by a physician that the employee is limited in his or her ability to perform the job, the next issue becomes will he or she ever be able to expect a return to full duty status? After that decision is made, then the employer determines if it can provide an accommodation to the employee, assuming the employee requests one. Most employers try to accommodate their employee as long as the employer's needs are not adversely affected. Generally, we have found employers have very few light duty positions in protective service available for accommodating the restrictions employees are forced to endure.

The matter of limitations on work also raises a number of concerns relative to future opportunities and benefits. Under the Americans with Disabilities Act (ADA), an employee may receive an accommodation with a non-protective job that fits the work he or she can perform. However, very few employers would agree to continue pay at the protective's former level if the new job involved a position that by labor contract receives less pay and benefits. Most employees choose not to accept jobs of lesser pay and benefits because their lifestyles would be adversely impacted. For example, in the case of retirement, the age at which an employee could retire is extended and upon retirement the annuity they receive is based upon a lower formula, less salary, and generally requires more years of service.

Problem D concentrates on the issue of encouraging persons to return to work. We would recommend this as the primary focus of the Subcommittee. The goal we have set is to provide suggestions to the committee in order to stimulate conversation. We urge the committee to consider tuition and retraining reimbursement. We urge the committee to consider a number of rewards to encourage reemployment. We propose looking at a contract between employee and future employer to agree to pay to the employee compensation equivalent to that previously received in their public employment. We would propose the state agree to pay the monies needed to make up the difference in salaries and benefits, assuming they were less than those enjoyed previously.

We have in our minds a view that a moral obligation exists to see that persons are given the necessary tools to reconstruct their lives. We can agree the benefits should not be without offsets, but we believe the focus needs to be placed upon helping persons get on with their life in as productive a fashion as possible. The view that disabled workers are in need of a structured benefit designed exclusively to prevent abuse is repugnant to us. First, that thinking assumes workers are essentially

lying when they claim injury and are untrustworthy when they apply for disability. Second, thinking of that type suggests people have no intention of being productive and valuable members of society ever again.

We believe broad, erroneous assumptions are currently out in the air floating around. We believe the bulk of the audit bureau report offers a counterbalance to those assumptions. The report shows what the current status of the program is in terms of cost (past, present and future) and the number of recipients and then makes recommendations for changes to the program. To us, its only weakness is it lacks the fundamental understanding that 40.65 benefits are for persons who are disabled and are unable to perform their jobs only as police officers and firefighters. The plan is not a disability program for persons who are disabled from any other employment other than that as a protective.

All of us need to consider, when making recommendations for program changes, ways in which modifications to the program can help to get people back to work. A major point in every discussion has been cost. We believe if we have fewer people in the program at full benefits the cost will go down or remain constant. The LAB numbers tell us there are people who could go back to some kind of employment. Why not concentrate on that as opposed to straight line restrictions that force people who are no longer capable of working to stay on the job or to force people to look for newer ways to beat the system.

In the area of 40.65, we believe we need to begin with the end in mind. We need to identify a goal, such as getting people back to work, then set up a system to ensure that it happens. We urge the committee to think in those terms.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

Nos. 95-1905 & 95-2228

STATE OF WISCONSIN : IN SUPREME COURT

FILED

MAY 22, 1997

Marilyn L. Graves
Clerk of Supreme Court
Madison, WI

Ronald W. Coutts, Sr.,

Petitioner-Appellant,

v.

Wisconsin Retirement Board,

Respondent-Respondent-Petitioner,

City of Racine,

Respondent.

Byron Des Jarlais,

Petitioner-Respondent,

v.

Wisconsin Retirement Board,

Respondent-Appellant-Petitioner.

REVIEW of a decision of the Court of Appeals. *Affirmed.*

¶1 ANN WALSH BRADLEY, J. The Wisconsin Retirement Board ("the Board") seeks review of a published decision of the court

of appeals,[1] which held that the Board is not statutorily authorized to reduce the duty disability benefits of Ronald W. Coutts, Sr. and Byron Des Jarlais with worker's compensation benefits previously paid to them. The Board argues that the court of appeals erred because the statute in question requires an offset of duty disability benefits with all worker's compensation payments, regardless of when the worker's compensation payments are made. We conclude that the statute unambiguously mandates an offset of duty disability benefits only with worker's compensation payments paid after the duty disability benefit payments commence. Accordingly, we affirm the decision of the court of appeals.

I.

¶2 The parties have stipulated to the relevant facts:

Ronald W. Coutts, Sr.

¶3 Ronald W. Coutts, Sr. was employed as a City of Racine firefighter, and was therefore a "protective occupation participant" for purposes of the Wisconsin Retirement System (WRS). See Wis. Stat. § 40.02(48)(1995-96).[2] In August 1988, Coutts suffered an injury to his right shoulder while fighting a fire. Following surgery on the shoulder and a period of physical therapy, Coutts returned to light duty employment at the Racine

[1] Coutts v. Wisconsin Retirement Bd., 201 Wis. 2d 178, 547 N.W.2d 821 (Ct. App. 1996)(consolidating Coutts' and Des Jarlais' cases).

[2] Unless otherwise indicated, all future statutory references are to the 1995-96 volume.

Fire Department in January 1989. However, the permanent physical limitations resulting from the shoulder injury eventually forced Coutts to retire. His last day on the Fire Department payroll was September 30, 1989.

¶4 Following his injury, Coutts filed a claim for permanent partial disability benefits pursuant to the Worker's Compensation Act, Chapter 102, Wis. Stat.[3] In April 1989, the Worker's Compensation Division of the Department of Industry, Labor and Human Relations (DILHR) determined that Coutts was entitled to permanent partial disability benefits. The permanent partial disability benefits were paid at a rate of $524.33 per month, effective January 7, 1989. In January 1990, Coutts received the last $524.33 full monthly payment of permanent partial disability benefits, and in February 1990, he received a final payment of $101.88.

¶5 Coutts also applied for duty disability benefits under Wis. Stat. § 40.65.[4] In May 1989, the Department of Employe

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[3] Coutts also applied for and received worker's compensation temporary total disability benefits.

[4] Section 40.65(4) provides:

> A protective occupation participant is entitled to a duty disability benefit as provided in this section if:
>
> (a) The employe is injured while performing his or her duty or contracts a disease due to his or her occupation;
>
> (b) The disability is likely to be permanent; and
>
> (c) 1. The disability causes the employe to retire from his or her job;

Trust Funds (DETF) advised Coutts that he was eligible to receive duty disability benefits. When Coutts left the payroll of the Fire Department, he began receiving § 40.65 duty disability benefits.

¶6 The DETF reduced Coutts' § 40.65 duty disability benefits each month by $524.33, which was the monthly amount of worker's compensation permanent partial disability benefits that he was receiving at the time.[5] The net result was that Coutts'

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2. The employe's pay or position is reduced or he or she is assigned to light duty . . . .

[5] See Wis. Stat. § 40.65(5)(b), providing in part:

> The Wisconsin retirement board shall reduce the amount of a participant's monthly benefit under this section by the amounts under subds. 1. to 6., ... The Wisconsin retirement board may assume that any benefit or amount listed under subds. 1. to 6. is payable to a participant until it is determined to the board's satisfaction that the participant is ineligible to receive the benefit or amount . . . .
>
> 1. Any OASDHI benefit payable to the participant or the participant's spouse or a dependent because of the participant's work record.
>
> 2. Any unemployment compensation benefit payable to the participant because of his or her work record.
>
> 3. Any worker's compensation benefit payable to the participant, including payments made pursuant to a compromise settlement under s. 102.16(1). A lump sum worker's compensation payment or compromise settlement shall reduce the participant's benefit under this section in monthly amounts equal to 4.3 times the maximum benefit which would otherwise be payable under ch. 102 for the participant's disability until the lump sum amount is exhausted.

monthly combination of duty disability and worker's compensation benefits were the same as if he received duty disability benefits alone. However, the monthly $524.33 reduction in duty disability benefits continued even after Coutts stopped receiving worker's compensation benefits in February 1990. The DETF based this continued duty disability reduction on the worker's compensation payments that Coutts had received in the months prior to the commencement of duty disability benefits. As such, after his worker's compensation benefits ceased in February 1990, Coutts received $524.33 less per month in aggregate benefits than he received in the immediately preceding months.

¶7 In a letter sent to the DETF in August 1990, Coutts objected to the offsets against duty disability benefits occurring after his worker's compensation benefits ended. The DETF responded that duty disability benefits are to be reduced by all worker's compensation benefits received for the same disability injury, regardless of whether the worker's compensation payments are made before or after the commencement

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4. Any disability and retirement benefit payable to the participant under this chapter [40], or under any other retirement system, that is based upon the participant's earnings record and years of service. . . .

5. All earnings payable to the participant from the employer under whom the duty disability occurred.

6. All earnings payable to the participant from an employer, other than the employer under whom the duty disability occurred, and all income from self-employment . . . .

of duty disability benefits. Coutts appealed the DETF's determination to the Board. See § 40.03(8)(f).

¶8 The Board, in a final decision and order dated September 15, 1994, concluded that the plain language of § 40.65(5)(b)3 requires an offset of all worker's compensation payments against § 40.65 duty disability benefits, regardless of the timing of the worker's compensation benefits payments.[6] Coutts filed a petition for certiorari review in the Circuit Court for Dane County, Angela Bartell, Judge.

¶9 The circuit court determined that § 40.65(5)(b)3 is ambiguous. However, according to the circuit court, other provisions in § 40.65, as well as the legislative history, evince a broad legislative intent to offset duty disability payments with other sources of income, without regard to the time that the duty disability payments commence. Determining that the Board's interpretation of § 40.65 was consistent with the legislative intent, the circuit court affirmed the Board's decision. Coutts appealed. The court of appeals reversed, concluding that the statute is unambiguous and does not authorize the DETF to reduce § 40.65 duty disability benefits with previously paid worker's compensation benefits. The Board petitioned this court for review.

[6] The Board's final decision and order adopted the proposed decision and order of the hearing examiner.

Byron L. Des Jarlais

¶10 Byron L. Des Jarlais was employed as a deputy sheriff for Vilas County. In 1988, Des Jarlais suffered a work-related back injury for which he received both temporary total disability and permanent partial disability benefits under the Worker's Compensation Act. Des Jarlais received a total of $8,190 in permanent partial disability payments, with the final payment being made in December 1988.[7]

¶11 After aggravating his back injury while on the job, Des Jarlais applied for § 40.65 duty disability benefits in April 1991. The DETF approved his application, and duty disability payments commenced in August 1991. The DETF reduced Des Jarlais' monthly duty disability payment by $503.10 until the amount deducted equaled the $8,190 in permanent partial disability payments that Des Jarlais had received through December 1988.[8]

¶12 The Board rejected Des Jarlais' claim that his disability benefits should not be reduced by the worker's compensation paid nearly three years prior to the commencement of duty disability benefits. Des Jarlais appealed to the Circuit Court for Dane County, Michael Nowakowski, Judge, which ruled in

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[7] The permanent partial disability was computed as 70 weeks at $117 per week, for a total of $8,190.

[8] In 1993, Des Jarlais received an additional permanent partial disability award of $587.33, which the DETF deducted from his monthly duty disability check. Because the additional $587.33 of worker's compensation was paid after the commencement of duty disability benefits, Des Jarlais does not dispute that the DETF properly reduced his duty disability benefits by that amount. We therefore do not address the offset of the additional $587.33.

his favor. The circuit court concluded that § 40.65 unambiguously precluded the DETF from reducing duty disability benefits with previously received worker's compensation benefits. The court of appeals affirmed the decision of the circuit court, and the Board petitioned this court for review.

II.

¶13 The sole question before this court is whether the phrase "any worker's compensation benefit payable" in § 40.65(5)(b)3 authorizes the Board to reduce a WRS participant's duty disability benefits with worker's compensation benefits paid prior to the commencement of duty disability benefits. Generally, the interpretation of a statute is a question of law reviewed by this court under a de novo standard, without deference to the decisions of the court of appeals, circuit court, or administering agency. State ex rel. Parker v. Sullivan, 184 Wis. 2d 668, 699, 517 N.W.2d 449 (1994). In certain instances, however, we will refrain from substituting our interpretation of a statute for that of the agency charged with administering the statute. An agency's interpretation of a statute is reviewed under one of three standards: de novo, "due weight" deference, or "great weight" deference. Sauk County v. WERC, 165 Wis. 2d 406, 413-14, 477 N.W.2d 267 (1991).

¶14 An agency's interpretation of a statute will be reviewed de novo if any of the following are true: 1) the issue before the agency is clearly one of first impression;[9] 2) a legal

[9] See Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 244-45, 493 N.W.2d 68 (1992).

question is presented and there is no evidence of any special agency expertise or experience;[10] or 3) the agency's position on an issue has been so inconsistent that it provides no real guidance.[11] Under de novo review, the agency's interpretation is given no weight. William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue, 160 Wis. 2d 53, 71, 465 N.W.2d 800 (1991), rev'd on other grounds by Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992). We conclude that de novo review is appropriate in these cases.

¶15 These cases are analogous to Kelley Co., Inc. v. Marquardt, 172 Wis. 2d 234, 493 N.W.2d 68 (1992). At issue in Kelley was the Department of Industry, Labor and Human Relations' (DILHR) interpretation of the phrase "equivalent employment position" in the Family and Medical Leave Act (FMLA), Wis. Stat. § 103.10(8)(a)2. This court concluded that de novo review was appropriate, because the meaning of the statutory language was a question of first impression with respect to which DILHR had no experience or expertise. Kelley, 172 Wis. 2d at 245. The Kelley court based its conclusion on the fact that DILHR had adopted no administrative rules interpreting the meaning of the phrase at issue in that case, and that "the hearing examiner relied on no

[10] See William Wrigley, Jr. Co. v. Wisconsin Dep't of Revenue, 160 Wis. 2d 53, 71, 465 N.W.2d 800 (1991), rev'd on other grounds by Wisconsin Dep't. of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214 (1992).

[11] See Marten Transport, Ltd. v. DILHR, 176 Wis. 2d 1012, 1018-19, 501 N.W.2d 391 (1993).

precedent and had no rules to aid him in arriving at his conclusion . . . ." Id.

¶16 For purposes of the instant cases, the Administrative Code is devoid of rules interpreting the phrase "any worker's compensation benefit payable," and there is no evidence in the record that the Board has ever considered whether § 40.65(5)(b)3 compels an offset of previously paid worker's compensation benefits against presently payable duty disability benefits. As in Kelley, in neither of the present cases did the hearing examiners rely on administrative rules or precedent in reaching the conclusion that the phrase "any worker's compensation benefit payable" includes worker's compensation benefits paid prior to the commencement of duty disability benefits. We therefore conclude that the issue presented in these cases is one of first impression in which the Board has no special experience or expertise, and that de novo review of the Board's interpretation of the phrase "any worker's compensation benefit payable" is appropriate.

¶17 We find unpersuasive the Board's citation to three instances in which it has applied § 40.65(5)(b)3 to offset duty disability benefits with previously paid worker's compensation benefits. Two of the cases cited by the Board are the very cases before this court. The third is a decision by the Board issued on the same day as its decision on Des Jarlais' claim.[12] As

[12] Feiereisen v. Wisconsin Retirement Board, No. 95-CV-0022 (Dane County, Wis. Cir. Ct. Aug. 22, 1995).

such, all three cases are irrelevant to the issue of whether the meaning of § 40.65(5)(b)3 was a question of first impression for the Board when it rendered decisions on Coutts' and Des Jarlais' claims.

¶18 Having determined the appropriate standard of review, we turn next to interpreting the statutory provision at issue in these cases. When interpreting a statute, this court seeks to identify and effectuate the intent of the legislature. Stockbridge School Dist. v. DPI, 202 Wis. 2d 214, 219, 550 N.W.2d 96 (1996). We begin by considering the words of the statute. If the statutory text is clear and unambiguous on its face, we need not look further. Stockbridge, 202 Wis. 2d at 220. If the language is ambiguous, we will then construe the statute by examining its history, context, subject matter, scope, and object. Id.

¶19 For purposes of our ambiguity analysis, the relevant portion of § 40.65(5) provides:

> (b) The Wisconsin retirement board shall reduce the amount of a participant's monthly benefit under this section by the amounts under subs. 1. to 6 . . . .
>
> 3. Any worker's compensation benefit payable to the participant . . . .

(Emphasis added). The Board, Coutts, and Des Jarlais agree that the language at issue has a clear meaning. However, Coutts and Des Jarlais view the statute as unambiguously supporting their position that duty disability benefits cannot be reduced by previously paid worker's compensation benefits, whereas the Board

contends that the statute clearly sustains the opposite proposition.

¶20 Language is ambiguous if it may be reasonably understood to have more than one meaning. State ex rel. Girouard v. Circuit Court for Jackson County, 155 Wis. 2d 148, 155, 454 N.W.2d 792 (1990). However, a statute is not rendered ambiguous merely by virtue of the parties' disagreement over its meaning. Wagner Mobil, Inc. v. City of Madison, 190 Wis. 2d 585, 592, 527 N.W.2d 301 (1995).

¶21 The word "payable" is the key to interpreting this statute.[13] Because the word is not defined in the statute, we look first to dictionary definitions of "payable."[14] Payable is defined as:

> Capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable. A sum of money is said to be payable when a person is under an obligation to pay it. Payable may therefore signify an obligation to pay at a future time, but, when used without qualification, term normally means that the debt is payable at once, as opposed to "owing."

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[13] The Board incorrectly focuses on the word "any" in the § 40.65(5)(b)3 phrase "any worker's compensation benefit." The statute's use of the word "payable" modifies and restricts the scope of the phrase "any worker's compensation benefit." This fact may be illustrated by the phrase "any automobile," which describes a larger universe than the phrase "any automobile that is red."

[14] The need to resort to a dictionary for the definition of statutory term is not a basis for determining that the term is ambiguous. See Girouard v. Circuit Court for Jackson County, 155 Wis. 2d 148, 156, 454 N.W.2d 792 (1990); State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 798 n.6, 407 N.W.2d 901 (1987).

Black's Law Dictionary 1128 (6th ed. 1990). See also Random House Unabridged Dictionary 1424 (2nd ed. 1993) ("payable" means "1. to be paid; due").

¶22 These definitions demonstrate that the term "payable" refers to sums presently owing or to be remitted in the future. The definitions do not support the proposition that the word "payable" includes sums that have been remitted in the past. It is axiomatic that a sum which is "paid" is no longer "payable." We therefore conclude that § 40.65(5)(b)3 is unambiguous, and does not authorize the Board to reduce § 40.65 duty disability benefits with worker's compensation benefits paid prior to the commencement of duty disability benefits.

¶23 Our inquiry could end with the determination that § 40.65(5)(b)3 is unambiguous. Yet, in our quest to identify and give effect to the legislature's intent, we may assume solely for the sake of the inquiry that the statutory language is ambiguous. Even if the language is ambiguous, which it is not, there is strong extrinsic evidence that the legislature did not intend that the term "payable" in § 40.65(5)(b)3 include worker's compensation paid prior to the commencement of duty disability benefits.

¶24 When construing a statute, we examine the language in question in the context of the statute as a whole. See General Castings Corp. v. Winstead, 156 Wis. 2d 752, 758, 457 N.W.2d 557 (Ct. App. 1990), citing Falkner v. Northern States Power Co., 75 Wis. 2d 116, 124, 248 N.W.2d 885 (1977). Examining § 40.65 as a whole, we note that the term "payable" is used in each of the six

§ 40.65(5)(b) subsections describing the types of income that the Board shall deduct from monthly duty disability payments. When the same term is used repeatedly in a single statutory section, it is a reasonable deduction that the legislature intended that the term possess an identical meaning each time it appears. See Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 663, 539 N.W.2d 98 (1995).[15]

¶25 The Board asserts that the phrase "any worker's compensation benefit payable" calls for a reduction in duty disability benefits by any worker's compensation payments without regard to the timing of the payments. Yet, if we ascribe the same meaning to "payable" in the remaining § 40.65(5)(b) subsections dealing with other types of income, unreasonable and absurd constructions of the statute arise, a result to be avoided. See Lake City Corp. v. City of Mequon, 207 Wis. 2d 156, 163, 558 N.W.2d 100 (1997) ("It is also a fundamental rule of statutory construction that any result that is absurd or unreasonable must be avoided").

¶26 For example, if the Board's definition of "payable" is extended to § 40.65(5)(b)2, the phrase "any unemployment compensation benefit payable" would mandate a reduction in duty disability benefits by the amount of unemployment compensation received prior to the commencement of duty disability benefits.

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[15] See also Legislative Reference Bureau, Wisconsin Bill Drafting Manual 1997-1998 § 2.01(15)(a) (revised August 1996) (legislation "should use identical words for the expression of identical ideas to the point of monotony")(citation omitted).

Such an offset would essentially effect a retroactive denial of unemployment compensation benefits, an anomalous result. Similarly, under the Board's conception of the word "payable," the phrase "all earnings payable" in §§ 40.65(5)(b)5 & 6 would authorize a reduction in duty disability benefits with employment earnings received prior to the commencement of duty disability payments. Such a construction is both unreasonable and unnecessary. The absurdities vanish under our determination that "payable" allows the reduction in duty disability only by contemporaneously received income described in § 40.65(5)(b).

¶27 The Board's belief that the word "paid" is subsumed within the statutory term "payable" is also belied by the legislature's creation of statutes using both words.[16] If the

[16] See, e.g., Wis. Stat. § 59.64(4)(a)("orders, scrip or certificates of indebtedness shall bear no interest if paid or payable within one month from date of issuance"); Wis. Stat. § 71.78(2)("the department [of revenue] shall make available upon suitable forms prepared by the department information setting forth the net Wisconsin income tax, Wisconsin franchise tax or Wisconsin gift tax reported as paid or payable in the returns filed by any individual or corporation . . . ."); Wis. Stat. § 78.80(4)("The department of revenue shall inform each requester of the amount paid or payable under ss. 78.01, 78.40 and 78.555 . . . ."); Wis. Stat. § 102.835(1)(f)("'property' includes all tangible and intangible personal property and rights to that property, including compensation paid or payable . . . ."); Wis. Stat. § 108.04(2)(f)("A[n unemployment compensation] claimant is ineligible to receive benefits for any week for which benefits are paid or payable because the claimant knowingly provided the department [of industry, labor and job development] with a false social security number"); Wis. Stat. § 139.02(2)(a)("Each eligible producer [of fermented malt beverages] shall receive a credit in the amount of 50% of the tax paid or payable . . . on the first 50,000 barrels taxed . . . ."); Wis. Stat. §§ 632.32(5)(i)2(authorizing automobile insurance policies that reduce uninsured and underinsured motorist coverage by "amounts paid or payable under any worker's compensation law"); Wis. Stat. § 812.30(7)("'Earnings' means compensation paid or payable by the

Board is correct that "paid" is a lesser included meaning of "payable," then the legislature has repeatedly engaged in the hollow gesture of using both terms in the same descriptive phrase. Such a construction of the statute is at odds with the rule that effect must be given to each word of a statute if possible, so that no portion of the statute becomes superfluous. See Lake City, 207 Wis. 2d at 163; State v. Petty, 201 Wis. 2d 337, 355, 548 N.W.2d 817 (1996); Ann M.M. v. Rob S., 176 Wis. 2d 673, 680, 500 N.W.2d 649 (1993). Because the two words can and should be given distinct meanings, we conclude that "paid" does not come within the meaning of "payable."

¶28 Contrary to the Board's assertions, the legislative history of § 40.65 offers little, if any, insight into the meaning to be given to the phrase "any worker's compensation benefit payable." The legislature enacted § 2, ch. 278, Laws of 1981, which created § 40.65, in order to correct perceived problems in the then existing system of benefits for protective occupation participants in the WRS. One of these problems was the phenomenon of "duplicate benefits" or "double dipping" caused by a lack of coordination between duty disability benefits and "other income replacement programs such as social security, worker's compensation, unemployment compensation, the state retirement system, etc." See Report of Joint Survey Committee on Retirement Systems 3, LRB-4909/1.

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garnishee for personal services . . . and includes periodic payments under a pension or retirement program") (emphasis added throughout).

¶29 We agree with the court of appeals that the legislative history is equivocal on the issue of whether duty disability benefits are to be reduced by worker's compensation benefits received prior to the commencement of duty disability payments. Coutts v. Wisconsin Retirement Bd., 201 Wis. 2d 178, 194-95, 547 N.W.2d 821 (Ct. App. 1996). While the legislative history may support the Board's position, the legislative history is just as supportive of the proposition that the legislature intended to address the "double dipping" problem by preventing the simultaneous receipt of income listed in § 40.65(5)(b) and full duty disability benefits. Our interpretation of § 40.65(5)(b)3 effectuates that intent.

¶30 Finally, the Board contends that absurd results follow from the conclusion that duty disability payments cannot be reduced by worker's compensation benefits paid prior to the commencement of duty disability payments:

> The disabled participant who applied for and collected worker's compensation permanent partial disability benefits before applying for the sec. 40.65 duty disability benefits would be able to collect unreduced monthly duty disability benefits. An otherwise identically situated disabled participant who first established sec. 40.65 duty disability eligibility and then applied for and collected worker's compensation benefits would have those benefits offset against the duty disability. Thus, in the latter case, winning a worker's compensation proceeding or agreeing to a compromise settlement would not increase that participant's monthly income.

Petitioner's Brief at 25.

¶31 While we agree with the Board that its two hypothetical participants will receive different levels of monthly income, we

cannot say that such a result is absurd. As the court of appeals noted, the participant who waits to apply for duty disability benefits gives up the opportunity to receive those benefits in the interim. Coutts, 201 Wis. 2d at 193. Thus, it appears that an injured employee has an incentive to apply for duty disability benefits without delay.

¶32 We recognize that in limited instances a participant may have an incentive to delay in applying for duty disability benefits. However, it appears to us that the unpredictability of workplace injury precludes most of the opportunity to engage in such strategizing. More importantly, to the extent that the statute does leave room for strategizing by participants, the authority rests with the legislature, rather than this court, to change the meaning of the statute.

¶33 In summary, we conclude that § 40.65(5)(b)3 does not authorize the reduction of duty disability benefits with worker's compensation benefits paid prior to the commencement of duty disability payments. Our determination of the legislature's intent is based upon the plain meaning of the statute, and is supported by the context in which the language in question appears. Accordingly, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

Office of the Mayor
James M. Smith

City of Racine, Wisconsin

City Hall
730 Washington Avenue
Racine, Wisconsin 53403
414-636-9111
414-636-9570 FAX

May 20, 1997

MAY 22 1997

Senator Rick Grobschmidt
State Capitol
P. O. Box 7882
Madison, WI 53707-7882

Dear Senator Grobschmidt:

I am taking this opportunity to address you concerning a matter of great importance to the City of Racine -- namely, proposed changes in the current duty-disability provisions for protective employees, S.40.65.

The City of Racine currently has 30 duty-disability retirees who are disabled, in varying degrees, from performing their protective jobs. This has caused an additional payment of approximately $1.2 million dollars to the Wisconsin Retirement System as a "surcharge" for the percentage of disability cases we have.

It is not the City's intention to be unsympathetic to the legitimate, serious, long-term disability cases, but there must be reform in the Statute to allow for the degrees of disability, the State monitoring of the disabilities and the objectivity of medical documentation and review.

With this in mind, I strongly recommend you give serious consideration to proposed changes that are or will be before you. This growing liability will continue to have a major impact on all communities in the State.

Should you desire to have more detailed information on this matter, please feel free to contact the City of Racine Personnel Department.

Thank you for your anticipated consideration of this matter.

Sincerely,

James M. Smith
Mayor

c: Ed Huck, Exec. Director
Wisconsin Alliance of Cities
James C. Kozina, City Personnel Director

State of Wisconsin \ JOINT SURVEY COMMITTEE ON RETIREMENT SYSTEMS
AND THE RETIREMENT RESEARCH COMMITTEE

BLAIR L. TESTIN
RESEARCH DIRECTOR

ROOM 316; 110 E. MAIN STREET
MADISON WISCONSIN 53703

(608) 267-0507
FAX (608) 267-0675

May 22, 1997

TO: Members of the RRC Protective Study Subcommittee

FROM: Blair Testin, RRC Consultant B.T.

RE: **SUMMARY OF LEGISLATIVE AUDIT BUREAU RECOMMENDATIONS - AUGUST, 1996**

The Legislative Audit Bureau published its audit of the s. 40.65 Duty Death and Disability Program for protectives in August 1996. This 43 page report contains much valuable data, but also a number of specific recommendations for action or change. This memo summarizes the LAB recommendations contained in this report:

"Page 22: We recommend that to guide its practice of accumulating cash reserves to pay for accrued liabilities in the Duty Disability program, the Employe Trust Funds Board develop a formal policy similar to the existing policy governing funding of the Wisconsin Retirement System, and notify participating employers of that policy and its effect on current and future premiums charges to employers.

Page 22: We recommend the Employe Trust Funds Board direct its actuary to review the current assumption of the life span of Duty Disability program recipients to ensure it reflect the duty disability population.

Page 23: We recommend that the Protective Study Subcommittee of the Retirement Research Committee consider adding the effect of the Duty Disability program on the Wisconsin Retirement System to the scope of its research.

Page 26: We recommend the Legislature amend s. 40.65, Wis. Stats., to allow the Department of Employe Trust Funds to use existing medical examinations performed for related worker's compensation claims in determinations of duty disability applications, where appropriate.

Page 27: We recommend the Legislature amend s. 40.07 , Wis. Stats., to allow the Department of Employe Trust Funds to provide employers of duty disability applicants with copies of the applicants' medical reports.

Page 29: We recommend the Department of Employe Trust Funds clarify the Department's interpretation of the employer's role in the application-review process, make that interpretation available to all employers, and promptly revise its application form accordingly.

Page 30: We recommend the Legislature amend s. 40.65 (2)(b)2., Wis. Stats., to transfer from the physician to the employer responsibility for determining whether an employe was injured on the job, was assigned light duty, had a reduction in pay or position, or had promotional opportunities adversely affected.

Page 38: We recommend the Legislature amend s. 40.65, Wis. Stats., to require that:

- duty disability recipients with partial disabilities receive annual medical examinations during the first five years of program eligibility, and additional medical examinations once in every three-year period thereafter until normal retirement age; and

- the Department of Employe Trust Funds be granted authority to terminate duty disability benefits for those individuals whose disabilities no longer prevent them from engaging in protective work as measured by the periodic medical examinations.

Page 39: We recommend the Legislature amend s. 40.65 (4)(c)2., Wis. Stats., to allow a disabled individual assigned to permanent light duty to maintain protective status, and to remove assignments to light duty from the eligibility criteria for duty disability."

BT:db

Professional Fire Fighters of Wisconsin, Inc.

7 North Pinckney Street • Suite 135 • Madison, WI 53703-2840 • 608/251-5832
Fax 608/251-8707

Member of INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
Member of WISCONSIN STATE A.F. of L.-C.I.O.

PROFESSIONAL FIRE FIGHTERS OF WISCONSIN INC.

Mark D. Zeier
State President
2513 South 14th Street
Sheboygan, WI 53081
Home Phone (414) 452-7956
Fire Phone (414) 459-3330

Michael Dobish
State Vice-President
1545 Arboretum Drive, No. 130
Oshkosh, WI 54901
Home Phone (414) 233-2125
Fire Phone (414) 751-5125

Rick Gale
State Sec.-Treas.
2831 South 114th Street
West Allis, WI 53227
Home Phone (414) 321-6590
Fire Phone (414) 302-8000
Fax (414) 321-7596

May 22, 1997

TO: MEMBERS OF THE PROTECTIVE STUDY COMMITTEE

FROM: Mark D. Zeier, State President
Professional Fire Fighters of Wisconsin

SUBJECT: 40.65 Program Discussions

MAY 23

Dear Committee Members:

Thank you for the opportunity to address the concerns raised on the Duty Disability Program. We have received and reviewed Mr. Weber's May 12, 1997, correspondence and have offered our initial response.

In response to Problem A, of Chief Counsel Weber's memorandum, we do not believe tying the benefit more directly to the degree of disability to the body as a whole would provide the protection to the protective employe previously intended by the legislature. We believe that the statute was intended to provide a benefit close to the employe's normal salary (75-80%), if the injured employe could no longer be employed in the opinion of two physicians as a protective occupant.

We think some of the concerns Mr. Weber has in Problem A could be resolved in looking at Problem B. We have contacted other state fire associations about periodical, medical reexaminations and agree they do have some merit. They would reaffirm that the disability still exists and additionally, the injury is reevaluated to the employe's benefit to insure proper treatment is or has been accomplished. If, for whatever reason, the disability ceases, the employe should be, if the employer elects, offered to return to his/her former position and rank (i.e., Captain, Fire Equipment Operator, Paramedic).

The employe should be made "whole" as to all benefits including all retirement contributions and credited years of service. He/she must be offered to recertify any previously held training requirements at the employer's cost. Basically, this reflects full rights of reemployment.

If reexaminations are adopted, and the previously described reemployment is offered, the employe's disability benefits would evaporate, therefore, remedy B, #2 would have merit.

In addressing Mr. Weber's Problem C, it is the understanding of fire fighters that if, in the duties of their profession they become disabled, and, in the opinion of two approved physicians, cannot return to "full duty status," that the statute provides for a benefit so they can continue to support themselves and their families close to their previous standard of living.

In the eyes of some, a minor injury should receive less benefit, but no one knows what tolls the protective employe's prior years of service of fighting fires, lifting and carrying patients, or extricating victims from accident vehicles, has taken on their bodies.

As a point of information, most all cities we represent, have drastically reduced the number of fire fighters they employ over the past 25 years. (Example: In Sheboygan in 1972, 88 fire fighters were employed. Today in 1997, only 70 fire fighters are presently employed.)

Cities are growing, fires are getting hotter with the addition of plastic products, the addition of emergency medical and hazardous material responses is making this profession more and more dangerous with less people to do more.

Problem D addresses a concern to encourage a person to continue to work for the same employer. We believe this has merit, but should be left up to the employers and employes to do through collective bargaining, due to the differences of operating budgets, department operations, and opinions of the villages, towns, cities, counties and state employers.

There are other areas of Mr. Weber's memorandum we believe have merit and would expedite the process. We will respond to them at your request .

We understand, from the employer's position, the concern of the "increasing costs." What we would ask the committee to do is request an actuary on the "possible cost shifting" of the normal retirement contributions to the disability contributions, as mentioned by the Legislative Audit Bureau, Mr. Testin, and Mr. Korpady. Protective contribution costs have dropped from 16% of payroll (8% for employer--8% for employe), to 12.4% (6.2% + 6.2%), decreasing a total of 5.6% the past few years, while the cost of general employes' contributions for normal retirement have increased by more than 1% in the same years.

This actually may help all of us make qualified recommendations. We look forward to working together to resolve this very important issue. Thank you.

State of Wisconsin

Tommy G. Thompson
Governor

Jon E. Litscher
Secretary

137 East Wilson Street
P.O. Box 7855
Madison, WI 53707-7855

DEPARTMENT OF EMPLOYMENT RELATIONS

CORRESPONDENCE/MEMORANDUM

DATE: May 23, 1997

TO: Blair Testin
Consultant for the Retirement Research Committee

FROM: Jon E. Litscher
Secretary

SUBJECT: Proposed Reform of the Duty Disability Program

Thank you for the opportunity to comment about the modifications to the Duty Disability Program currently being considered by the Retirement Research Committee Protective Study Subcommittee.

The Duty Disability Program provides an important benefit for protective occupation participants, one which must be preserved for those individuals who are most seriously disabled. However, the benefit structure should be modified for those individuals who have less serious disabilities and incentives provided to encourage them to return to work. The recipients' total income should also be protected upon return to work in any capacity so that it does not fall below the amount of the benefit payable under the Duty Disability Program.

The Department of Employment Relations supports the proposed remedies outlined in the memo from Robert Weber dated May 12, 1997, with the following exceptions:

- Support for item B.2. is subject to the employe's restoration to the same or a similar position as a protective occupation participant, including all intervening pay adjustments.

- Support for item D. 1. is subject to the employe's continued eligibility for retirement at the earliest age applicable to a protective occupation participant. (For example, if the employe subsequently holds a position in the general retirement category, the

employe should continue to be eligible to retire at age 53 with the retirement benefit used as an offset against the duty disability benefit.)

- Support for item D. 1. (b) is withheld because there is insufficient information provided about what is intended to be included within the "terms of offers under this provision." (For example, it is unclear whether this proposal suggests that certain positions within a bargaining unit be designated for this purpose, that 40.65 recipients to be considered for vacant positions before other members of the bargaining unit, or that 40.65 recipients be allowed to displace other employes who hold positions the recipients are capable of performing.)

Any changes made in the Duty Disability Program should include the statutory provision of one benefit plan for all covered employes. In addition, any remaining benefit provisions of 1987 Wisconsin Act 363 should be made applicable to state employes and not subject to the collective bargaining process.

JEL:JLO

CC: Martin Beil, WSEU
Jessica O'Donnell

STATE OF WISCONSIN

MINUTES OF MEETING

RETIREMENT RESEARCH COMMITTEE

PROTECTIVE STUDY SUBCOMMITTEE

TUESDAY, MAY 27, 1997

1:30 P.M.

THE NORTH HEARING ROOM, STATE CAPITOL BUILDING

MADISON, WISCONSIN

CALL TO ORDER AND ROLL CALL

(Agenda Item 1)

The meeting of the RRC Protective Study Subcommittee was called to order by Co-Chair Grobschmidt at 1:39 p.m. in The North Hearing Room of the State Capitol Building in Madison, Wisconsin.

Roll call was taken as follows:

Present:	(6)	Sen. Grobschmidt, Mr. Heineck, Rep. Jeskewitz, Rep. Klusman, Mr. Stella, Sen. Wirch.
Absent:	(2)	Ms. O'Donnell, Mr. Pelzek.
Others Present:		Steve Werner, WPPA; Steve Urso, WPPA; Bridget Bussler, WCA; Sandy Drew, DETF; Dick Lipke, Retired PFFW; Andy Garcia, WPPA; Mark Zeier, PFFW; Rick Gale, PFWW; Pete Christianson, Wis. State Fire Chiefs Assoc.; Marty Beil, WSEU; Lisa Moen, Staff for Sen. Grobschmidt; Ginger Mueller, Staff for Rep. Klusman, Blair Testin, Consultant for RRC; Deb Breggeman, Staff for RRC.

CONSIDERATION OF MINUTES OF MAY 12, 1997

(Agenda Item 2)

Mr. Heineck moved, seconded by Representative Klusman, to approve the minutes of the May 12, 1997, meeting of the RRC Protective Study Subcommittee.

Motion carried by voice vote.

DISCUSSION OF S. 40.65 ISSUES AND ALTERNATIVES
(Agenda Item 3)

Mr. Blair Testin, Consultant for the RRC, mentioned the memo from Mr. Rob Weber, ETF, and the Legislative Audit Bureau Report that were reviewed at the May 12, 1997, Subcommittee meeting.

PUBLIC TESTIMONY
(Agenda Item 4)

Co-Chair Grobschmidt opened the meeting to public testimony.

Appearing before the Subcommittee were:

NAME	POSITION
1. **Mr. Marty Beil,** Wis. State Employees Union	**INFORMATION**
2. **Mr. Steve Urso,** Wis. Prof. Police Assoc.	**INFORMATION**
3. **Mr. Steve Werner,** Wis. Prof. Police Assoc.	**INFORMATION**
4. **Mr. Ed Huck,** Wis. Alliance of Cities	**INFORMATION**
5. **Mr. Mark Zeier,** Prof. Firefighters of Wis.	**INFORMATION**
6. **Mr. Dick Lipke,** Retired Prof. Firefighter	**INFORMATION**
7. **Ms. Bridget Bussler,** Wis. Counties Assoc.	**INFORMATION**

Hearing no further requests for testimony, Co-Chair Grobschmidt closed the hearing to public testimony.

Representative Klusman asked Mr. Blair Testin, Consultant, for suggestions relative to the future direction and focus of the Protective Study Subcommittee. Mr. Testin noted three areas which he felt all parties might agree on: 1) periodic retesting; 2) actuarial cost shifting; 3) encourage those who are disabled to continue with the same employer. Mr. Testin also felt that the Subcommittee, at its next meeting, could review the definition of

"protectives" and the areas of agreement on s. 40.65. Mr. Stella, DETF, agreed with the points Mr. Testin made. Mr. Stella, also, stated that the Subcommittee may be interested in working on specific issues where there is "common ground".

OTHER MATTERS
(Agenda Item 5)

There were no other matters discussed at this time.

ADJOURNMENT
(Agenda Item 6)

The meeting of the RRC Protective Study Subcommittee adjourned at 3:32 p.m.

Debra K. Breggeman, Recording Secretary

AFSCME Council 24

AFL-CIO

WISCONSIN STATE EMPLOYEES UNION

The Union That Cares

8033 Excelsior Drive, Suite C, Madison, WI 53717

Phone (608) 836-0024
Fax (608) 836-0222

Martin Beil
Executive Director

Gary Lonzo
President

TESTIMONY OF MARTIN BEIL
BEFORE THE JOINT SURVEY COMMITTEE ON RETIREMENT SYSTEMS
DUTY DISABILITY WORK GROUP
May 27, 1997

On behalf of the more than 5,000 employees in the protective status, I would like to thank the subcommittee for the invitation to comment on ETF's position "reforming" the duty disability program (40.65).

Our union has a grave concern about "reform" of the current duty disability program. We have reviewed the audit report, we have listened to the concerns of some public employers, we have discussed the matter with other effected unions, and we have looked at the reality of employment from the perspective of a protective status employee. In this review we have not found anything seriously wrong with the law or its administration. This protection has been substantially in effect since 1947. These benefits were designed to apply over and above worker's compensation in that "protectives" are expected and in fact often ordered to perform duties without regard to injury or death in the protection of lives and property. These benefits are provided in the public's interest in that the priority consideration has been the safety of the public.

In state employment there are two separate statutes covering special disability cases. Wisconsin State Statute 230.36 covers temporary continuation of pay in injury cases involving protective personnel and some select others in general status. Statute 40.65 covers injuries presumed to be permanent. Over the last five years risk management of DOA has basically "managed" the 230.36 benefits. Similar to ETF's position of 40.65, risk management claimed that they would expedite benefits, work closely in the healing process and assist in accommodating employees back to work. The track record has been ugly. Benefits are several months late in coming, employees are hounded by managed care nurses and degraded by independent medical examiners and medical terminations are at an all time high (for general occupation participants). It would seem to us that ETF wants to develop a similar environment. Experience tells us that the remedies put forth will probably result in a reduction in benefits and new rules and regulations that will make life more difficult for those receiving the benefit.

Quoting Roy Kubista, "if it works, don't fix it". It's a given that costs related to this program have increases as more protectives go out because of the violence in the changing society, however costs of the ordinary retirement program for protectives have gone down.

Finally, legislative changes to 40.65 would indeed be risky. Unlike the "agreed upon bill" process of worker's compensation, this legislation would be subject to amendments that could easily result in a chaotic, unworkable piece of legislation. Why would we want to subject our dedicated protective workforce to that kind of treatment and indignity? It is obvious that the proponents of "reform" can maybe talk the talk, but have never walked the walk.

###

wca
Wisconsin Counties Association

MEMORANDUM

TO: Honorable Members of the Retirement Research Committee Protective Study Subcommittee

FROM: Bridget Bussler, Legislative Associate

DATE: May 27, 1997

SUBJECT: Concerns regarding current duty disability program under Wis. Stat. 40.65

The Wisconsin Counties Association (WCA) has had an opportunity to review the May 12, 1997 memorandum from Mr. Thomas Korpady to the Retirement Research Committee Protective Study Subcommittee regarding concerns related to the current duty disability program.

WCA supports reform of the current duty disability program to address the concerns outlined in the May 12 and in the August 1996 Department of Employee Trust Funds evaluation of the Duty Disability program.

We respectfully request the committee to consider our comments regarding the four major areas of concern as follows:

BENEFIT LEVEL NOT COMMENSURATE WITH INJURY LEVEL

The current duty disability system provides the same level of benefits regardless of the severity of disability. In February, the WCA Board of Directors voted to support the provision of a formula to determine benefit levels based upon level of disability.

LIFETIME BENEFITS REGARDLESS OF RECOVERY OR IMPROVEMENT

Current duty disability benefits are lifetime benefits regardless of improvement or recovery of the recipient. WCA feels that the continued payment of full benefits even in cases of improvement or recovery is a flaw inherent in current law rather than intentional abuse of the duty disability system by recipients. We feel that periodic re-examination and inclusion of a provision to allow termination of benefits in cases of recovery, will allow for a more equitable system. We also feel there is a need for incentives to

100 River Place, Suite 101 ◆ Monona, Wisconsin 53716-4016
608/224-5330 ◆ 800/922-1993 ◆ Fax: 608/224-5325

Mark M. Rogacki, Executive Director
Darla M. Hium, Deputy Director
Mark D. O'Connell, Legislative Director
Lynda L. Bradstreet, Administrative Director

encourage those able to re-enter the workforce to do so. For this reason, WCA supports the audit recommendation to provide functional capacity evaluation and access to training and post-secondary education.

PRESENT LAW FAILS TO ACCURATELY DESCRIBE NATURE AND DEGREE OF DISABILITY FOR WHICH BENEFITS ARE INTENDED

WCA feels that in order to overcome some of the problems associated with determination of benefits, the eligibility criteria should be re-written to include more specific definitions of disabilities based upon medical terminology, rather than an individual's subjective opinion regarding job duties.

NO INCENTIVE TO CONTINUE WORKING FOR SAME EMPLOYER

As present law contains no provisions to encourage an individual qualifying for duty disability benefits to continue working for the same employer if such opportunity exists, WCA supports including such provisions to provide incentives for re-employment including an offset against benefits of an amount which would be earned by the recipient had he/she accepted a position which he/she was offered and is capable of performing.

100 River Place, Suite 101 ◆ Monona, Wisconsin 53716-4016
608/224-5330 ◆ 800/922-1993 ◆ Fax: 608/224-5325

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Professional Fire Fighters of Wisconsin, Inc.

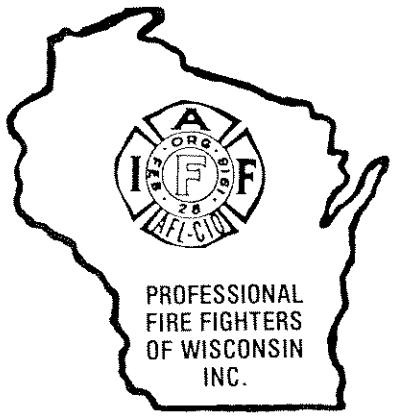
7 North Pinckney Street • Suite 135 • Madison, WI 53703-2840 • 608/251-5832
Fax 608/251-8707

Member of INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
Member of WISCONSIN STATE A.F. of L.-C.I.O.

Mark D. Zeier
State President
2513 South 14th Street
Sheboygan, WI 53081
Home Phone (414) 452-7956
Fire Phone (414) 459-3330

Michael Dobish
State Vice-President
1545 Arboretum Drive, No. 130
Oshkosh, WI 54901
Home Phone (414) 233-2125
Fire Phone (414) 751-5125

Rick Gale
State Sec.-Treas.
2831 South 114th Street
West Allis, WI 53227
Home Phone (414) 321-6590
Fire Phone (414) 302-8000
Fax (414) 321-7596



May 27, 1997

TO: MEMBERS OF THE PROTECTIVE STUDY COMMITTEE

FROM: Mark D. Zeier, State President
Professional Fire Fighters of Wisconsin

SUBJECT: 40.65 Program Discussions

Dear Committee Members:

Thank you for the opportunity to address the concerns raised on the Duty Disability Program. We have received and reviewed Mr. Weber's May 12, 1997, correspondence and have offered our initial response.

In response to Problem A, of Chief Counsel Weber's memorandum, we do not believe tying the benefit more directly to the degree of disability to the body as a whole would provide the protection to the protective employe previously intended by the legislature. We believe that the statute was intended to provide a benefit close to the employe's normal salary (75-80%), if the injured employe could no longer be employed in the opinion of two physicians as a protective occupant.

We think some of the concerns Mr. Weber has in Problem A could be resolved in looking at Problem B. We have contacted other state fire associations about periodical, medical reexaminations and agree they do have some merit. They would reaffirm that the disability still exists and additionally, the injury is reevaluated to the employe's benefit to insure proper treatment is or has been accomplished. If, for whatever reason, the disability ceases, the employe should be, if the employer elects, offered to return to his/her former position and rank (i.e., Captain, Fire Equipment Operator, Paramedic).

The employe should be made "whole" as to all benefits including all retirement contributions and credited years of service. He/she must be offered to recertify any previously held training requirements at the employer's cost. Basically, this reflects full rights of reemployment.

If reexaminations are adopted, and the previously described reemployment is offered, the employe's disability benefits would evaporate, therefore, remedy B, #2 would have merit.

In addressing Mr. Weber's Problem C, it is the understanding of fire fighters that if, in the duties of their profession they become disabled, and, in the opinion of two approved physicians, cannot return to "full duty status," that the statute provides for a benefit so they can continue to support themselves and their families close to their previous standard of living.

In the eyes of some, a minor injury should receive less benefit, but no one knows what tolls the protective employe's prior years of service of fighting fires, lifting and carrying patients, or extricating victims from accident vehicles, has taken on their bodies.

As a point of information, most all cities we represent, have drastically reduced the number of fire fighters they employ over the past 25 years. (Example: In Sheboygan in 1972, 88 fire fighters were employed. Today in 1997, only 70 fire fighters are presently employed.)

Cities are growing, fires are getting hotter with the addition of plastic products, the addition of emergency medical and hazardous material responses is making this profession more and more dangerous with less people to do more.

Problem D addresses a concern to encourage a person to continue to work for the same employer. We believe this has merit, but should be left up to the employers and employes to do through collective bargaining, due to the differences of operating budgets, department operations, and opinions of the villages, towns, cities, counties and state employers.

There are other areas of Mr. Weber's memorandum we believe have merit and would expedite the process. We will respond to them at your request .

We understand, from the employer's position, the concern of the "increasing costs." What we would ask the committee to do is request an actuary on the "possible cost shifting" of the normal retirement contributions to the disability contributions, as mentioned by the Legislative Audit Bureau, Mr. Testin, and Mr. Korpady. Protective contribution costs have dropped from 16% of payroll (8% for employer--8% for employe), to 12.4% (6.2% + 6.2%), decreasing a total of 3.6% the past few years, while the cost of general employes' contributions for normal retirement have increased by more than 1% in the same years.

This actually may help all of us make qualified recommendations. We look forward to working together to resolve this very important issue. Thank you.

STATE OF WISCONSIN

RRC PROTECTIVE STUDY SUBCOMMITTEE

TUESDAY, MAY 27, 1997

1:30 P.M.

THE NORTH HEARING ROOM, STATE CAPITOL BLDG.

A G E N D A

1. Call to Order and Roll Call.

2. Consideration of the Minutes of the May 12, 1997 Meeting.

3. Discussion of s. 40.65 Issues and Alternatives.

4. Public Testimony.

5. Other Matters.

6. Adjournment.

s. 40.65, 1995 stats.

ment board for teacher participants and to the Wisconsin retirement board for participants other than teachers. A copy of the report and notice of the date that the report was presented, or will be presented to the appropriate board, and the board's name, shall be mailed to the affected annuitant. An annuitant may request a hearing under s. 227.44 to contest the department's determination by filing a timely appeal with the appropriate board. If a request for a hearing is not timely filed, and the appropriate board does not disapprove the department's determination or request additional information within the time allowed for filing appeals, the report shall be final. If the board requests additional information, the report shall be final 30 days after the board's receipt of the requested information unless the board disapproves the department's determination.

(10) Upon termination of an annuity in accordance with sub. (9), each participant whose annuity is so terminated shall, as of the beginning of the calendar month following termination, be credited with additional contributions equal to the then present value of the portion of the terminated annuity which was originally provided by the corresponding type of additional contributions. Except for additional contributions, the retirement account of the participant shall be reestablished as if the terminated annuity had never been effective, including crediting of interest and of any contributions and creditable service earned during the period the annuity was in force.

(11) In this section "substantial gainful activity" means employment for which the annual compensation exceeds, for determinations made in the calendar year commencing on January 1, 1982, $3,600 or, for determinations made in subsequent calendar years, the amount applied under this section in the previous calendar year increased by the salary index and ignoring fractions of the dollar.

History: 1981 c. 96, 386; 1983 a. 141 s. 20; 1983 a. 191 s. 6; 1983 a. 290; 1985 a. 11; 1985 a. 182 s. 57; 1987 a. 303, 372; 1989 a. 13, 166; 1991 a. 39, 152; 1995 a. 27 s. 9130 (4).

40.65 Duty disability and death benefits; protective occupation participants. (2) (a) This paragraph applies to participants who first apply for benefits before May 3, 1988. Any person desiring a benefit under this section must apply to the department of industry, labor and job development, which department shall determine whether the applicant is eligible to receive the benefit and the participant's monthly salary. Appeals from the eligibility decision shall follow the procedures under ss. 102.16 to 102.26. If it is determined that an applicant is eligible, the department of industry, labor and job development shall notify the department of employe trust funds and shall certify the applicant's monthly salary. If at the time of application for benefits an applicant is still employed in any capacity by the employer in whose employ the disabling injury occurred or disease was contracted, that continued employment shall not affect that applicant's right to have his or her eligibility to receive those benefits determined in proceedings before the department of industry, labor and job development or the labor and industry review commission or in proceedings in the courts. The department of industry, labor and job development may promulgate rules needed to administer this paragraph.

(b) 1. This paragraph applies to participants who first apply for benefits under this section on or after May 3, 1988.

2. An applicant for benefits under this section shall submit or have submitted to the department an application that includes written certification of the applicant's disability under sub. (4) by at least 2 physicians, as defined in s. 448.01 (5), who practice in this state and one of whom is approved or appointed by the department, and a statement from the applicant's employer that the injury or disease leading to the disability was duty–related.

3. The department shall determine whether or not the applicant is eligible for benefits under this section on the basis of the evidence in subd. 2. An applicant may appeal a determination under this subdivision to the department of industry, labor and job development.

4. In hearing an appeal under subd. 3., the department of industry, labor and job development shall follow the procedures under ss. 102.16 to 102.26.

5. The department shall be an interested party in an appeal under subd. 3., and the department shall receive legal assistance from the department of justice, as provided under s. 165.25 (4).

(3) The Wisconsin retirement board shall determine the amount of each monthly benefit payable under this section and its effective date. The board shall periodically review the dollar amount of each monthly benefit and adjust it to conform with the provisions of this section. The board may request any income or benefit information, or any information concerning a person's marital status, which it considers to be necessary to implement this subsection and shall require a participant to submit a certified copy of his or her most recent state or federal income tax return. The board may terminate the monthly benefit of any person who refuses to submit information requested by the board or who submits false information to the board.

(4) A protective occupation participant is entitled to a duty disability benefit as provided in this section if:

(a) The employe is injured while performing his or her duty or contracts a disease due to his or her occupation;

(b) The disability is likely to be permanent; and

(c) 1. The disability causes the employe to retire from his or her job;

2. The employe's pay or position is reduced or he or she is assigned to light duty; or

3. The employe's promotional opportunities within the service are adversely affected if state or local employer rules, ordinances, policies or written agreements specifically prohibit promotion because of the disability.

(4m) A protective occupation participant who is a state motor vehicle inspector hired on or after January 1, 1968, is not entitled to a duty disability benefit under this section for an injury or disease occurring before May 1, 1990.

(4r) A protective occupation participant who is an emergency medical technician is not entitled to a duty disability benefit under this section for an injury or disease occurring before the date on which the department receives notification of the participant's name as provided in s. 40.06 (1) (d) and (dm).

(5) (a) The monthly benefit payable to participants who qualify for benefits under s. 40.63 or disability benefits under OASDHI is 80% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 80% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II at the date of application, but not to less than 50% of the participant's monthly salary. For participants who do not qualify for benefits under s. 40.63 or disability benefits under OASDHI, the monthly benefit under this section is 75% of the participant's monthly salary adjusted under par. (b) and sub. (6), except that the 75% shall be reduced by 0.5% for each month of creditable service over 30 years or over 25 years for persons who are eligible for benefits under subch. II on the date of application.

(b) The Wisconsin retirement board shall reduce the amount of a participant's monthly benefit under this section by the amounts under subds. 1. to 6., except that the board may determine not to reduce a participant's benefit because of income related to therapy or rehabilitation. The Wisconsin retirement board may assume that any benefit or amount listed under subds. 1. to 6. is payable to a participant until it is determined to the board's satisfaction that the participant is ineligible to receive the benefit or amount, except that the department shall withhold an amount equal to 5% of the monthly benefit under this section until the amount payable under subd. 3. is determined.

1. Any OASDHI benefit payable to the participant or the participant's spouse or a dependent because of the participant's work record.

2. Any unemployment compensation benefit payable to the participant because of his or her work record.

3. Any worker's compensation benefit payable to the participant, including payments made pursuant to a compromise settlement under s. 102.16 (1). A lump sum worker's compensation payment or compromise settlement shall reduce the participant's benefit under this section in monthly amounts equal to 4.3 times the maximum benefit which would otherwise be payable under ch. 102 for the participant's disability until the lump sum amount is exhausted.

4. Any disability and retirement benefit payable to the participant under this chapter, or under any other retirement system, that is based upon the participant's earnings record and years of service. A reduction under this subdivision may not be greater in amount than the amount of disability or retirement benefit received by the participant. If the participant is not eligible for a retirement benefit because he or she received a lump sum payment or withdrew his or her contributions on or after the date the participant became eligible to receive a benefit under this section, the amount received or withdrawn shall reduce the participant's benefit under this section in the amount of benefit that would be payable if, on the date the amount was received or withdrawn, the full amount received or withdrawn was applied under s. 40.23 (2m) (d) as additional employe contributions credited to the participant's account.

5. All earnings payable to the participant from the employer under whom the duty disability occurred.

6. All earnings payable to the participant from an employer, other than the employer under whom the duty disability occurred, and all income from self–employment, the total of such earnings and income shall reduce the participant's benefit as follows:

a. For the amount of the total that is less than 40% of the participant's monthly salary, one–third of such amount;

b. For the amount of the total that is from 40% to 80% of the participant's monthly salary, one–half of such amount; and

c. For the amount of the total that is more than 80% of the participant's monthly salary, two–thirds of such amount.

(c) The Wisconsin retirement board may not reduce a participant's benefit because of income or benefits that are attributable to the earnings or work record of the participant's spouse or other member of the participant's family, or because of income or benefits attributable to an insurance contract, including income continuation programs.

(6) The Wisconsin retirement board shall adjust the monthly salary of every participant receiving a benefit under this section using the salary index for the previous calendar year as follows:

(a) For the purposes of sub. (5) (b) 6., annually on January 1 until the participant's death;

(b) For the purposes of sub. (5) (a), if the participant is receiving an annuity under s. 40.63 (1), annually on January 1 until the participant's death; and

(c) For the purposes of sub. (5) (a), if the participant is not receiving an annuity under s. 40.63 (1), annually on January 1 until the first January 1 after the participant's 60th birthday. Beginning on the January 1 after the participant's 60th birthday the participant's monthly salary shall be increased annually in a percentage amount equal to the percentage amount of dividend awarded under s. 40.27 (2) until the participant's death. Notwithstanding s. 40.27 (2), any benefits payable under this section are not subject to distribution of annuity reserve surpluses.

(7) (a) This paragraph applies to benefits based on applications filed before May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under age 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse, if the spouse was married to the participant on the date the participant was disabled within the meaning of sub. (4), one–third of the participant's monthly salary as reflected at the time of death until the surviving spouse marries again.

2. To the guardian of a surviving unmarried child under age 18, $15 per child until the child marries, dies or reaches 18 years of age.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 65% of the participant's monthly salary as reflected at the time of death. Any reduction of benefits caused by such limitation shall be done on a proportional basis.

(am) This paragraph applies to benefits based on applications filed on or after May 3, 1988. If a protective occupation participant dies as a result of an injury or a disease for which a benefit is paid or would be payable under sub. (4), and the participant is survived by a spouse or an unmarried child under the age of 18, a monthly benefit shall be paid as follows:

1. To the surviving spouse until the surviving spouse remarries, if the spouse was married to the participant on the date that the participant was disabled under sub. (4), 50% of the participant's monthly salary at the time of death, but reduced by any amount payable under sub. (5) (b) 1. to 6.

2. To a guardian for each of that guardian's wards who is an unmarried surviving child under the age of 18, 10% of the participant's monthly salary at the time of death, payable until the child marries, dies or reaches the age of 18, whichever occurs first. The marital status of the surviving spouse shall have no effect on the payments under this subdivision.

3. The total monthly amount paid under subds. 1. and 2. may not exceed 70% of the participant's monthly salary at the time of death reduced by any amounts under sub. (5) (b) 1. to 6. that relate to the participant's work record.

4. Benefits payable under this paragraph shall be increased each January 1 by the salary index determined for the prior year.

(b) Any person entitled to a benefit under both this subsection and ch. 102 because of the death of the same participant, shall have his or her benefit under this subsection reduced in an amount equal to the death benefit payable under ch. 102.

(9) This section is applicable to protective occupation participants who apply for a benefit under this section on or after July 1, 1982. A participant may not apply for a benefit under this section if he or she is receiving a benefit under s. 66.191, 1981 stats., on July 1, 1982.

History: 1981 c. 278; 1983 a. 9; 1983 a. 141 s. 20; 1983 a. 191 s. 6; 1983 a. 255; 1985 a. 332 s. 251 (1); 1987 a. 363; 1989 a. 240, 357; 1995 a. 27 s. 9130 (4).

Cross–reference: See s. 891.45 for provision as to presumption of employment–connected disease for certain municipal fire fighters.

The Wisconsin Retirement Board may not reduce duty disability benefits under sub. (5) (b) 3. for worker's compensation benefits which are paid to a participant before the duty disability payments commence, and may do so only for worker's compensation not yet paid. Coutts v. Wisconsin Retirement Board, 201 W (2d) 178, 547 NW (2d) 821 (Ct. App. 1996).

Duty Disability

Wisconsin needs a Duty Disability program that provides income protection for law enforcement officers and firefighters injured in the line of duty, encourages the permanently disabled to find new careers, protects their Wisconsin Retirement Fund pensions and protects taxpayers from misuse of a flawed system.

History

Disability benefits for employees in the protective services were established in 1948. In 1982, benefits increased from 50% to 80% of final salary. Following the increase, disability claims rose fivefold, and the cost of the locally financed program rose to $12.7 million last year.

The Problem

A Legislative Audit Bureau report in August detailed shortcomings of the program, including:

- The program does not allow injured workers to be transferred to desk jobs or community relations work.
- A lack of periodic medical review of disability status.
- A limited role for employers in reviewing disability claims.

The Solution

In addition to the recommendations by the Wisconsin Audit Bureau outlined below, we recommend the following be adopted as a package:

1. Provide a full duty disability benefit under the worker's compensation schedule, Wis. Stats., 102.52, 102.53, and 102.54. Review must be by an independent medical examiner familiar with the worker's compensation program. After the scheduled benefit period expires, provide for a reduced subsidy if the claimant is 30% disabled or less.

2. Do not allow withdrawal of retirement dollars from the employee trust fund by claimants of duty disability. Should they die prior to reaching retirement age, this would provide a safety net for their widow/er and/or dependents.

3. Provide an option for claimants to receive a flat 50% benefit with no offset for income earned in the private sector plus the ability to retire at the age determined by state statutes. At retirement, claimants would no longer be receiving duty disability benefits, but would draw from their retirement account.

(more)

4. Require mandatory retirement for duty disability eligible employees when they are eligible for full retirement benefits.

5. In addition, adopt the Audit Bureau's recommendations, including:

   - Amending 40.65, Stats., to allow the Department of Employe Trust Funds to use existing medical examinations performed for related workers compensation claims in determinations of duty disability applications, where appropriate.

   - Amending 40.07, Stats., to allow the Department of Employe Trust Funds to provide employers of duty disability applicants with copies of the applicants' medical reports.

   - Clarifying the Department of Employe Trust Funds interpretation of the employer's role in application-review process, making that interpretation available to all employers, and promptly revising ETF's application form accordingly.

   - Amending 40.65 (2) (b) 2., Stats., to transfer from the physician to the employer responsibility for determining whether an employee was injured on the job, was assigned light duty, had a reduction in pay or position, or had promotional opportunities adversely affected .

   - Amending 40.65(4)(C)2., Stats., to allow a disabled individual assigned to permanent light duty to maintain protective status, and to remove assignment to light duty from the eligibility criteria for duty disability.

   - To encourage re-training, waiving tuition at the University of Wisconsin and Wisconsin Technical College System for duty disability recipients, as it currently is for children of slain police and firefighters — at state, not local, expense.

■

DATE OF HEARING:

PROTECTIVE STUDY SUBCOMMITTEE

OF THE RETIREMENT RESEARCH COMMITTEE

	PRESENT	ABSENT	EXCUSED
Senator Rick Grobschmidt, Senate Co-Chair Room 404, 100 N. Hamilton Street	✓		
Representative Judith Klusman, Assembly Co-Chair Room 119 West, Capitol Building	✓		
Senator Robert Wirch Room 422, 119 Martin Luther King Jr. Blvd.			
Representative Suzanne Jeskewitz Room 119 West, Capitol Building	✓		
Mr. David Stella, Dept. Of Employee Trust Funds 801 W. Badger Road; Madison, WI 53713	✓		
Mr. David Heineck, Insurance Commissioner's Office 121 E. Wilson Street; Madison, WI 53703	✓		
Ms. Jessica O'Donnell, Dept. Of Employment Relations 137 E. Wilson Street; Madison, WI 53703			
Mr. Timothy Pelzek, State Employee Representative 6332 W. Manitoba Street; Milwaukee, WI 53219			