

LOCAL GOVERNMENT PENSION SCHEME ("LGPS")

PENSION BOARDS

OPINION

INTRODUCTION

1. I am instructed to advise the Local Government Association ("the LGA") on three, related, questions:-

- (1) The legal status of a Local Government Pension Scheme ("LGPS") Pension Board;
- (2) The legal relationship between such a Pension Board and the "scheme manager"; and
- (3) The "conflict" described below.

2. The LGPS operates pursuant to the Superannuation Act 1972 and Regulations thereunder (together "the LGPS Regulations"), which are subject to frequent amendment. A feature of the regime is the "administering

authority”. The “administering authority” will be administering on behalf both of itself and of other LGPS employers.

3. As a matter of general principle, an apparent conflict between differing legislative provisions should always be resolved if possible by finding a way in which the provisions can be read together and reconciled. The legislative provisions in issue here are contained in the Local Government Act 1972 (“LGA 1972”) and the Public Service Pensions Act 2013 (“the 2013 Act”).

PENSION BOARDS: THE 2013 ACT

4. Pension Boards are a creature of the 2013 Act. Section 1(1) of the 2013 Act states that Regulations thereunder (“Scheme Regulations”) may establish “schemes” for the payment of pensions and other benefits to or in respect of persons specified in subsection (2). Subsection (2) provides that those persons include local government workers, as defined. Sections 2 and 3 and Schedules 1-3 make further provision about Scheme Regulations.

5. Moving on to governance, Section 4 of the 2013 Act provides that Scheme Regulations must provide for a “person” to be responsible for managing or administering the scheme and any statutory pension scheme that it

is connected with. That could include a local authority, governed by LGA 1972, in its existing capacity as an LGPS “administering authority”.

6. Section 5 of the 2013 Act then relates to Pension Boards. It is central for present purposes.

7. Subsection (1) of Section 5 states that Scheme Regulations must provide for the establishment of a “board” with responsibility for assisting the scheme manager in relation to matters specified in subsection (2). Subsection (3) provides that this is with a view to securing the “effective and efficient governance and administration” of the scheme.

8. Subsection (4) of Section 5 sets out provisions which Scheme Regulations must contain. They include important provisions for avoiding conflicts of interest, as defined by subsection (5), on the part of a “member” of the Pension Board.

9. They also include provision, critical for present purposes, as to the membership of the Board: Section 5(4)(c). The Pension Board under the 2013 Act must include, in equal numbers, “employer representatives” and “member

representatives”, each as defined in subsection (6). This is very different from a local authority committee under LGA 1972.

10. Subsection (7) of Section 5 of the 2013 Act provides that where the scheme manager of a scheme is a “committee of a local authority” the Scheme Regulations “may” provide for that committee “also” to be the Pension Board for the purposes of Section 5. This sits uneasily with subsection (4)(c).

11. However, it is apparent from Section 5(7) of the 2013 Act that:-

- (1) It is possible for a Pension Board (under the 2013 Act) and a local authority committee (under LGA 1972), and therefore their respective memberships, to be the same; and
- (2) This may sometimes be the case and sometimes not.

12. There are accordingly two situations to consider:-

- (1) Where a Pension Board and a local authority committee are the same; and
- (2) Where they are not.

13. Section 6 of the 2013 Act makes further provision about Pension Boards. However, the 2013 Act is silent as to the legal status of a Pension Board. Nor does it purport to amend LGA 1972.

14. Paragraph 44 of the Explanatory Notes for the 2013 Act states, with reference to Section 5 of the 2013 Act (emphasis added):-

“Subsection (7) relates to the public service schemes that are administered by local authorities and fire and rescue authorities. It makes provision for pension boards for the pension schemes for fire and rescue workers and local government workers in England, Scotland and Wales. It allows for scheme regulations in those schemes to provide that where a local authority has appointed a committee to carry out its responsibilities to manage or administer the pension scheme, that committee may also be the pension board. The committee will then have the dual role of responsibility for administering the scheme, and responsibility for ensuring good governance and compliance with requirements imposed by the Pensions Regulator. The provisions on conflicts of interest and representation of interests will need to be satisfied for a local authority committee to be the pension board for the scheme.”

15. This reaffirms that:-

(1) There may, or may not, in a particular case, be a “dual role”; and

- (2) If and when there is a “dual role”, there must be compliance with the provisions of the 2013 Act as to “representation of interest” and conflicts of interest (by implication, without prejudice to compliance also with LGA 1972).

16. Nonetheless, this does not readily resolve the apparent discrepancy in the primary legislation between:-

- (1) On the one hand, the ability under Section 5(7) of the 2013 Act for a local authority committee (i) to be also the Pension Board and (ii) to carry out a dual role as local authority committee and Pension Board; and
- (2) The mandatory provision in Section 5(4)(c) of the 2013 Act as to representation of (employer and member) interests, which requires particular membership of Pension Boards under the 2013 Act which is at variance with the customary membership of local authority committees.

PENSION BOARDS: THE 2015 REGULATIONS

17. Pursuant to the 2013 Act there have been made the Local Government Pension Scheme (Amendment) (Governance) Regulations 2015, SI 2015/57 (“the 2015 Regulations”). Their provisions include inserting into the LGPS Regulations “Part 3: Governance”, beginning with Regulation 105.

18. Regulation 106 is headed “Local pension boards: establishment”. Regulation 106(1) and (2) provides (emphasis added):-

“(1) Each administering authority shall no later than 1st April 2015 establish a pension board (“a local pension board”) responsible for assisting it -

- (a) to secure compliance with -
 - (i) these Regulations,
 - (ii) any other legislation relating to the governance and administration of the Scheme and any connected scheme, and
 - (iii) any requirements imposed by the Pensions Regulator in relation to the Scheme and any connected scheme; and
- (b) to ensure the effective and efficient governance and administration of the Scheme and any connected scheme.

(2) Where the Scheme manager is a committee of a local authority the local pension board may be the same committee if approval in writing has been obtained from the Secretary of State.”

19. Therefore:-

(1) It is repeated that a Pension Board may be the same as a local authority committee; but

(2) This will be so only if the local authority seeks and obtains and acts upon Secretary of State (“SoS”) approval; and

(3) The approval process is potentially subject to judicial review.

20. Regulation 106 further provides (emphasis added):-

“(7) Except where a local pension board is a committee approved under paragraph (2), no member of a local pension board shall have a right to vote on any question unless that member is an employer representative or a member representative.

(8) A local pension board shall have the power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.”

21. Regulation 106(7) of the 2015 Regulations is curious. It suggests that the representation of interests requirement of the 2013 Act may not necessarily apply in a dual role committee case.

22. Regulation 107 of the 2015 Regulations relates to the membership of Local Pension Boards. It provides (emphasis added):-

“(1) Subject to this regulation each administering authority shall determine -

- (a) the membership of the local pension board;
- (b) the manner in which members of the local pension board may be appointed and removed;
- (c) the terms of appointment of members of the local pension board.

(2) An administering authority must appoint to the local pension board an equal number, which is no less than 4 in total, of employer representatives and member representatives and for these purposes the administering authority must be satisfied that -

- (a) a person to be appointed to the local pension board as an employer representative has the capacity to represent employers; and
- (b) a person to be appointed to the local pension board as a member representative has the capacity to represent members.

(3) Except where a local pension board is a committee approved under regulation 106(2) (committee that is a Scheme manager is also local pension board) -

(a) no officer or elected member of an administering authority who is responsible for the discharge of any function under these Regulations (apart from any function relating to local pension boards or the Local Government Pension Scheme Advisory Board) may be a member of the local pension board of that authority; and

(b) any elected member of the administering authority who is a member of the local pension board must be appointed as either an employer representative or a member representative.

(4) Where a local pension board is a committee approved under regulation 106(2) (committee that is a Scheme manager is also local pension board) the administering authority must designate an equal number which is no less than 4 in total of the members of that committee as employer representatives and member representatives and for these purposes the administering authority must be satisfied that -

(a) a person to be designated as an employer representative has the capacity to represent employers; and

(b) a person to be designated as a member representative has the capacity to represent members.”

23. Regulation 107(4) therefore addresses dual role cases, and provides in such cases for the representation of interests requirement in the 2013 Act to be preserved in the local authority committee.

24. Regulation 109 of the 2015 Regulations provides that an administering authority must have regard to Guidance issued by the SoS in relation to Local Pension Boards.

25. The Explanatory Memorandum to the 2015 Regulations states (emphasis added):-

“7.9 Section 5(7) of the 2013 Act allows scheme regulation to provide for a committee of the administering authority constituted under section 101 of the Local Government Act 1972 which discharges the authority’s pensions functions and the local pension board to act as a combined body. Regulation 106(2) provides that this may occur only where approval has been granted by the Secretary of State.”

“7.12. To ensure that scheme member and employer representatives of local pension boards have a decisive influence, Regulation 106(7) restricts the right to vote on questions to those representatives. This does not apply where there is a combined committee discharging an authority’s pension functions and acting as the local pension board.”

- “7.14. Regulation 107 provides that each administering authority shall determine the membership of their local pension board ...
- 7.15. Regulation 107(2) requires membership of a local pension board to consist of an equal number of scheme member representatives and employer representatives which is no less than four in total. This carries forward the requirement in section 5(4)(c) of the 2013 Act and ensures that each board will have the capacity to undertake the functions described at paragraph 7.5.
- 7.16 Before appointing scheme member or employer representatives to a local pension board, Regulation 107(2)(a) and (b) provides that the administering authority must be satisfied that they have the capacity to represent scheme members and employers respectively.
- 7.17 Except where a local pension board is the same committee as the one discharging an authority’s pension functions Regulation 107(3)(a) provides that no officer or elected member of an administering authority responsible for any pensions function under the 2013 Regulations (apart from any function relating to local pension boards on the Scheme’s Scheme Advisory Board) may be a member of the administering authority’s local pension board. This will ensure that no officers and elected members appointed to a local pension board will be in a position of scrutinising

their role elsewhere in the Scheme. Regulation 107(3)(b) provides that any elected member who is a member of a local pension board must be appointed as either an employer or member representative (and consequently will be entitled to vote on any questions).

- 7.18 Regulation 107(4) ensures that the requirement under Regulation 107(2) for an equal number of scheme member and employer representatives is maintained in the situation where a local pension board is the same committee as that discharging the authority's pension functions."

LOCAL AUTHORITY COMMITTEES

26. Local authorities have powers of internal delegation. They can however at any time revoke the delegation. Moreover, there are rules as to political balance.

27. Section 101 of LGA 1972 enables a local authority to arrange for the discharge of their functions by a committee, a sub-committee or an officer of the authority (or by any other local authority). It does not authorise the discharge of functions by a Board that is not a committee of the authority. Such a Board must derive its statutory powers elsewhere.

28. It is Section 102 of LGA 1972 that relates to the appointment of local authority committees. Section 102(1)(a) authorises a local authority to appoint a committee of the authority.

29. By Section 102(3) of LGA 1972 a local authority committee may generally include persons who are not members of the appointing authority. It may not consist exclusively of persons who are not members of the authority; but it may consist exclusively of persons who are members of the authority. There is a wide discretion as to membership. However, Section 102(3) also provides that a committee or sub-committee may not include members who are not members of the appointing authority if the committee or sub-committee is “regulating and controlling the finance of the local authority or of their area”. A committee concerned with LGPS investments may be regarded as regulating and controlling the finance of the local authority. Insofar as members of the local authority and its committee structure cannot be employed by that authority itself, there can be members of a committee who are employed not by the administering authority but by another LGPS employer for which the authority is the administering authority.

30. Section 102 of LGA 1972 has not been amended by the 2013 Act: see Schedule 8 to the 2013 Act. However, Section 102 of LGA 1972 may, within

its own confines, be operated, albeit with great difficulty, so as to meet 2013 Act/2015 Regulations membership and other requirements, in a dual, or combined, role case. In such a hybrid case, general provisions as to local authority committees and members will apply, such as the Code of Conduct and the roles and responsibilities of the Monitoring Officer and the Chief Finance Officer.

STATUS

31. In my opinion, the starting point is that:-

- (1) Pension Boards have no corporate status;
- (2) They do, however, have a status, entirely pursuant to the 2013 Act and the 2015 Regulations;
- (3) They are constituted exclusively under the 2013 Act and the 2015 Regulations; and
- (4) They are not constituted at all under LGA 1972.

32. They are, therefore, in my opinion:-

- (1) Not local authority committees; but
- (2) May, or may not, be combined with a local authority committee, subject to the local authority wishing that, and subject to SoS approval.

33. The complication is indeed that, pursuant to the 2013 Act and the 2015 Regulations, a Pension Board may, or may not, also be, or be the same as, a local authority committee, constituted under LGA 1972. Certainly when the Pension Board is not also, or the same as, a local authority committee, I do not see how the Pension Board can be a local authority committee.

34. When, however, they are the same, then the Pension Board and the local authority committee will perform a “dual” or “combined” role. As I see it, in such a case the local authority committee will be governed by LGA 1972 in its administering authority/scheme manager role and by the 2013 Act and the 2015 Regulations in its Pension Board role.

RELATIONSHIP

35. In my opinion:-

- (1) The relationship between a Pension Board and a LGPS administering authority as scheme manager under the 2013 Act is basically the same whether or not the scheme manager is also the Pension Board; and
- (2) That relationship is governed entirely by the 2013 Act.

CONFLICT

36. When there is no dual or combined role, and the Pension Board, under the 2013 Act and the 2015 Regulations, and the local authority committee under LGA 1972 are separate, there is no conflict. The Pension Board will be appointed under and in accordance with the 2013 Act and the 2015 Regulations. The local authority committee will continue to be appointed under and in accordance with LGA 1972. There will be no need for their respective memberships to correspond totally or at all.

37. It will, however, be possible, with SoS approval, to have a dual or combined role only if the (voting) membership of the Pension Board and the (voting) membership of the local authority committee do correspond. This is theoretically possible but very difficult, given that there are different provisions

for membership in LGA 1972 on the one hand and in the 2013 Act and the 2015 Regulations on the other hand.

38. It may, however, not always be impossible, in that, as the 2015 Regulations and their Explanatory Memorandum suggest, it will be open to a local authority to appoint members to the committee under LGA 1972 who will meet the particular membership and representation requirements of the 2013 Act and the 2015 Regulations. That is the way in which apparently conflicting legislative provisions can, and, in my view, should be reconciled.

CONCLUSION

39. I do not regard the membership provisions of LGA 1972 and of the 2013 Act and 2015 Regulations as being mutually exclusive. I consider that a local authority committee under LGA 1972 is capable of being constituted, within the broad discretion under Section 102 of LGA 1972, so as to meet the requirements in the 2013 Act and the 2015 Regulations as to equal representation of member and employer interests.

40. However, in my opinion:-

- (1) If DCLG believe that Pension Boards are local authority committees (constituted under the 2013 Act rather than under LGA 1972), they are wrong;
- (2) A local authority committee can be constituted only under LGA 1972;
- (3) When the Pension Board is not the same as a local authority committee it will not be a local authority committee;
- (4) The Pension Board will be a local authority committee only, with the approval of the SoS, in a dual or combined role case.

41. My advice is that:-

- (1) An administering authority should think long and hard before choosing to go down the combined role route;
- (2) If nonetheless it does so, it must (i) take great care over the setting up of its arrangements and (ii) keep their workability or otherwise under constant review.

42. This is on account of the practical issues that arise when there is a combined role, as respects membership, capacity, insurance and reporting. As regards membership:-

- (1) The 2013 Act and 2015 Regulations require –
 - (i) An equal number of member representatives and employer representatives,
 - (ii) That no officer or elected member of the administering authority who is responsible for the discharge of any function under the 2015 Regulations (apart from any function relating to local pension boards or the Local Government Pension Scheme Advisory Board) may be a member of the local pension board of that authority, and
 - (iii) All voting members to be either member or employee representatives;
- (2) LGA 1972 –
 - (i) Allows for committee membership to include members who are not elected members of the authority, but not to exclude elected members entirely,

- (ii) Bars officers of the local authority from serving on a committee, and
 - (iii) Removes the ability to include non elected members on a committee where the committee is a “finance committee”, making investment decisions;
- (3) Therefore, in order to meet the requirements both of the 2013 Act and of the 2015 Regulations on the one hand and of LGA 1972 on the other hand –
 - (i) The hybrid committee would need an equal membership of member representatives and employer representatives where –
 - (a) the member representatives are not officers of the administering authority, and
 - (b) the employer representatives include at least one elected member from the administering authority, but who is not someone with a delegated pension responsibility; and

- (ii) The administering authority would need to place investment decisions in a separate (sub-)committee, consisting of elected members of the administering authority.

43. As regards capacity:-

- (1) The 2013 Act regime requires that member representatives have the capacity to represent members, yet no officers of the administering authority itself are allowed to sit on a hybrid committee; and
- (2) This problem is all the more acute in circumstances where the administering authority is by far the largest employer.

44. As regards insurance:-

- (1) Given that a Pension Board is a creature of the 2013 Act and not a council committee, the council's indemnity insurance will not automatically cover the Pension Board's membership;
- (2) There may nonetheless be circumstances in which the Pension Board's members would be potentially liable; and

(3) Therefore –

- (i) The Council should extend its insurance, or
- (ii) The Pension Board should procure its own insurance.

45. As regards reporting, the Council will have to decide upon arrangements for :–

- (1) Specific reporting routes; and
- (2) Access to statutory officers.

46. I have had the benefit of a Conference. I shall be happy to advise further as may be required. Useful Guidance, which I approve, has been provided by the Local Government Pension Board (last updated, 4 February 2015) especially at paragraphs 10.1-10.9.

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7 December 2015

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