

HERTFORDSHIRE COUNTY COUNCIL

LGPS PENSIONS BOARD

FRIDAY 8 DECEMBER 2017 AT 10:00AM

Agenda Item No:

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LEGAL ADVICE ON ADMISSION PROCESS

Report of the Assistant Director of Finance

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1 Purpose of the Report

- 1.1 The purpose of this report is to provide an overview of a number of proposed measures that were put for comment to the Fund's legal consultants Squire Patton Boggs (SPB) which seek to expedite the admissions process for new employers entering the fund.
- 1.2 Pension Board are asked to comment on the proposals in light of SPB's feedback, and approve the recommendation put forward in 6.2.

2 Background

- 2.1 As at 30 September 2017 the fund had a backlog of 18 employers with outstanding Admission Agreements (AA) despite the fact that their service contracts were underway.
- 2.2 Fund officers work with Hertfordshire County Council Legal Services and both the pending admission body and scheme employer (outsourcing party) to get these agreements finalised and in place in a timely manner following the commencement of the service contract.
- 2.3 There can be issues with completing these admissions for a number of reasons including dispute over conditions of admission, failure to provide required information and failure to put required indemnities in place (e.g. bond or guarantor) to support the admission. This can result in extended periods where the AA is not in place, and the scheme employer will be, by default, ultimately liable for any liabilities arising in relation to the transferring members.
- 2.4 In these cases the fund has sometimes struggled to bring all parties to complete these admissions due to a lack of engagement from some pending admission bodies, but has little formal recourse to encourage these bodies to complete this process.

3 Proposals

- 3.1 Squire Patton Boggs were requested to comment on the viability of a number of proposals put forward by Officers to encourage or incentivise employers to pursue completion of their Admission Agreement (AA) in a timely manner. This is in relation to outsourced contracts where there is a TUPE transfer of staff from a scheduled body who are currently members of the LGPS.
- 3.2 The proposals put forward were:
- 3.3 **Premium Contribution Rate** – Charging employers an intentionally high contribution rate from the point the contract starts until the AA is finalised. The actual contribution rate will often not be known until late in the AA process, and contributions will ordinarily not be collected prior to completion of the AA, therefore charging a premium rate (similar to an emergency tax rate) would seek to encourage employers to expedite this process. Contributions collected via this method would ultimately offset against the employers liability once the AA is in place.
- 3.4 **Charge in Lieu of Bond** – Imposition of a non-recoverable charge on an admission body from the point of contract commencement until the AA is completed. The value of this charge would pass to the ceding employer, to compensate them for the risk of indemnifying (by default) the admission body until formal indemnity (e.g. bond) is in place and outlined in the AA. Admission bodies that do not complete their AA are currently benefiting from not paying bond (or other indemnity) premiums, whilst the ceding employers are ultimately liable for the liabilities associated with the members involved in the TUPE, until the AA is finalised. The principal of the charge is that it should not be financially beneficial for an admission body to delay the admission process.
- 3.5 **Contribution in Lieu of Bond** – similar to the charge, above, however in this situation the amount collected would ultimately feed into the admission body's funding position once the AA is completed. Therefore this acts more as a cash flow penalty than a straight financial penalty.
- 3.6 **Administration Charge** – a simple charge levied onto admission bodies where the admission process takes longer than the standard expected timeframe. This charge would represent the additional time required from fund officers (pensions, legal etc.) in chasing and facilitating these arrangements being made – in cases where delays are clearly attributable to lack of activity on behalf of the admission body.

4 Assessment

- 4.1 Squire Patton Boggs reviewed the proposals, and made the following assessment:
- 4.2 **Premium Contribution Rate** – As this proposal takes the form of an additional contribution, which will be credited against the Employer's obligations once the AA is in place, SPB considered that it would be possible to collect this via a

secondary contribution rate (as outlined in Regulation 62 of the 2013 LGPS Regulations).

- Regulation 62 provides that the actuary must prepare a 'Rates and Adjustments Certificate' (RAC) in relation to the fund, which specifies the rate of employer contributions payable. The secondary rate is an adjustment to the primary rate 'by reason of any circumstances peculiar to that employer'. It would be proposed that in these circumstances the primary rate would be zero, and the secondary rate would represent the entirety of the 'Premium Contribution Rate', which would be determined in conjunction with the actuary. Ordinarily the RAC would not be issued until the actual contribution rates were known and the AA had been finalised.

4.3 **Charge in Lieu of Bond** – Squire Patton Boggs considered this less viable, given the basis of the charge being compensation for damages which may or may not arise. Legally, the charges would need to fit within the legal definition of 'liquidated damages', and legal precedent has found that it is not enough for a liquidated damages clause to set out a genuine pre-estimate of loss, but rather consider whether the detriment to the contract breaker (the admission body) is proportionate to the legitimate interest of the innocent party (the ceding employer). Whilst it may be possible to make this representation, this could be an approach open to likely legal challenge from admission bodies.

4.4 **Contribution in Lieu of Bond** – Squire Patton Bpoggs ultimately considered that this approach was similar in form to the premium contribution rate – and that one or the other could equally be applied via the secondary contribution rate of a RAC – but that it would be unnecessary to apply both.

4.5 **Administration Charge** – Squire Patton Boggs commented that it *may* be possible to apply this charge via a RAC, as part of the allowance for expenses which is chargeable via this method, and that opinion should be sought from the Actuary as to whether they thought this was viable. Alternatively SPB highlighted Regulation 70 (LGPS 2013 Regulation) which contains an explicit process for charging additional costs to employers who do not satisfy their obligations to the fund to the expected standard, which they feel could be used to facilitate this charge.

5 Further SPB Comments

5.1 Squire Patton Boggs highlighted that the wording of any RAC where a premium/secondary contribution rate is being applied should be carefully worded so that the actuary is comfortable that it falls within the provisions of the 2013 LGPS Regulations.

5.2 Squire Patton Boggs also suggest that any additional contributions or expenses should be set out in correspondence with the proposed outsourced provider as part of the negotiation of any new service contract. To this effect, they consider that it may be difficult to unilaterally apply a premium contribution rate or administration charge to existing employers with outstanding AA, but that it may be possible to provide them with notice that if they fail to complete the

agreements within a reasonable timeframe that they would be charged the premium rate and administration charges. SPB also highlight that this approach should also be discussed with the actuary before implementation.

6 Conclusion & Recommendation

- 6.1 Squire Patton Boggs concluded that the introduction of a premium contribution rate, in the form of a secondary contribution rate set out in a RAC, and the charging of additional administrative expenses would be a reasonable approach for the fund to take to meet the objectives set out in the proposal.
- 6.2 It is therefore recommended that Officers take this proposal to the Fund's actuary, Hymans Robertson, to seek their views on its practical implementation.