

DIVISION 1181 A.T.U. – NEW YORK EMPLOYEES PENSION FUND
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January 22, 2013

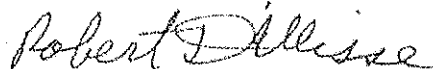
Dear Participant:

As you probably know, the Department of Education (“DOE”) issued a proposal for school bus contracts without the terms of the Employee Protection Provisions (“EPP”) under the Mollen Agreement. The DOE’s action will harm the Pension Fund and the Board of Trustees is making every effort to urge the DOE to reconsider its position, so that your long term retirement security will be protected. The Trustees wanted you to understand what is going on and so is sending you a copy of the Fund counsel’s letter to the Department of Education.

The Pension Fund must meet the funding rules under federal law. To help fund these benefits, federal law requires a special charge — called “withdrawal liability”— on each employer if that employer no longer has to contribute to the Fund, for example, if it loses all of its school bus contracts. Because of the strong and stable contribution base under the EPP, many years ago, the Fund requested a special exemption from withdrawal liability. The federal agency (the Pension Benefit Guaranty Corporation) granted this exemption because the Fund is not harmed when one employer stops contributing because the EPP requires that the replacement employer hire workers from the Master Seniority List and start contributing to the Fund for those workers. This has been an important part of the long term stability of the Fund.

With the economic downturn in 2008 and 2009, many pension funds have struggled to stay well funded. However, due to the strong stewardship of the Trustees and the Fund’s stable contribution base under the EPP, the Fund has remained in the highest funding status provided under the law – “safe” or “green zone.” Removal of the EPP will result in a loss of the exemption and could lead to events that will harm the long-term strength of the Fund. That is why we are urging the DOE to keep the EPP.

Very truly yours,



ROBERT D’ULISSE
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January 16, 2013

*Via Regular Mail and
Electronic Mail (dwalcott@schools.nyc.gov)*

Dennis M. Walcott, Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, NY 10007

Re: Impact of Bid Solicitation for School Bus Contracts on
Division 1181 A.T.U. – New York Employees Pension Fund

Dear Chancellor Walcott:

We are counsel to the Division 1181 A.T.U. – New York Employees Pension Fund (“Pension Fund”). The purpose of this letter is to alert you to the impact of the Department of Education (“DOE”) issuing a bid solicitation for school bus contracts without the terms of the Employee Protection Provisions (“EPP”) under the Mollen Agreement, since the Board of Trustees of the Pension Fund has been advised that the DOE has done so. These include the destabilization of the Pension Fund and the imposition of up to hundreds of millions of dollars of withdrawal liability on contributing employers to the Pension Fund. Of particular interest to the DOE, it will be treated as an employer with regard to the Pension Fund and therefore will be equally liable for this liability.

BACKGROUND

The Pension Fund is a multiemployer pension plan that has provided secure retirement income for the drivers and matrons of the New York City school bus industry for decades. It is maintained and funded under collective bargaining agreements between various school bus contractors and the Amalgamated Transit Union Local 1181-1061. The Pension Fund provides lifetime pension benefits to approximately 8,300 active participants and 4,700 retirees and beneficiaries currently.

As a multiemployer plan, the Pension Fund must meet specified funding requirements under applicable federal law, including the Employee Retirement Income Security Act

("ERISA"). To help maintain the funding of multiemployer plans, federal law imposes withdrawal liability on each employer for a proportionate share of any unfunded vested liabilities of the Pension Fund in the event that an employer ceases to have an obligation to contribute to the Pension Fund (or partially ceases to have an obligation, in some circumstances). The Pension Fund's unfunded vested liability, or total withdrawal liability, is currently \$92 million, which increases to \$521 million if all or substantially all the employers cease contributing to the Fund. However, for decades, the Pension Fund has operated under a special exemption from withdrawal liability ("Exemption") issued by a federal agency, the Pension Benefit Guaranty Corporation ("PBGC"), which exempts the employers from withdrawal liability if an employer withdraws.

Because of the continuity and stability of the contribution base provided under the EPP, in 1982, the Pension Fund requested that the PBGC grant the Exemption. In granting the Exemption in 1983, the PBGC concluded that the Pension Fund's contribution base is not harmed by the normal attrition of employers because of the requirement under the EPP that successful bidders hire workers who are on the Master Seniority List and that the new employer participate in the Pension Fund on behalf of those workers. The Exemption has been an integral component of the long term stability of the Pension Fund and has allowed the Pension Fund and industry to function in a dynamic and flexible way as employers enter and leave the industry.

Since the economic downturn in 2008 and 2009, many pension funds have struggled to maintain adequate funding levels. As has been well publicized, more than 60% of the multiemployer pension plans in the U.S are in "endangered" or "critical" funding status under the Pension Protection Act of 2006, the new law that sets the current funding standards. However, due to the strong stewardship of the Trustees and the Fund's stable contribution base from the EPP, the Pension Fund has remained in the highest funding category provided under the law -- "safe" or "green zone."

IMPACT OF LOSS OF EPP ON THE PENSION FUND

If the EPP no longer is a component of the contracts with the DOE, the industry conditions on which the Exemption was granted will no longer exist, since the coming and goings of individual employers will affect the Pension Fund's contribution base. This will result in the elimination of the Exemption. Once the Exemption no longer applies, if the DOE awards a contract to any employer that does not participate in the Pension Fund, the employer losing the work will be liable to pay withdrawal liability. However, there are standard issues of collectability -- such as the statutory limit on how much an employer is required to pay in a year, the legal cap on payments at 20 years, and many contractors likely will not be in business for 20 years if they lose their DOE contracts. Consequently, even with the most aggressive collection efforts, a significant portion of the Pension Fund's unfunded vested benefits may not be collectible from the withdrawing contractors. Therefore, removal of the EPP will destroy the legal framework upon which the Pension Fund participants and beneficiaries have relied and will precipitate a series of events that will endanger the long-term financial viability of the Pension Fund.

Under this new framework, shifts of school bus runs from one contractor to another will result in the assessment of significant liabilities, in the hundreds of millions of dollars; this contrasts with how the industry has operated for decades under the Exemption, where runs shifted to and from contractors as best served the DOE and the City's students without harm to the drivers and matrons and their retirement security, and without the assessment of withdrawal liability against employers.

If the industry collapses in a few years after most of the current participating employers withdraw from the Pension Fund because of the absence of the EPP, the Pension Fund could undergo a mass withdrawal, in which the withdrawal liability will dramatically increase from an estimated \$92 million to \$521 million as a result of the use of legally required lower PBGC interest rate assumptions.

DOE WITHDRAWAL LIABILITY

The private school bus contractors would not be the only ones liable for withdrawal liability. The DOE also is an "employer" under the withdrawal liability rules in Title IV of ERISA and thus is liable for the withdrawal liability of each contractor that withdraws. ERISA 3(5) states that a "person acting ... indirectly in the interest of an employer, in relation to an employee benefit plan" is an "employer." Courts have repeatedly applied this definition to what an "employer" means under Title IV of ERISA.

Courts have concluded that two separate entities will be the employer liable for withdrawal liability when there is a sufficient nexus of facts demonstrating shared control over the work of the employees. That is the case here. Pursuant to the contract between the DOE and most contractors, the DOE is responsible for all costs on behalf of matron-escorts, including the Pension Fund contributions, and pays these costs under a direct pass-through arrangement with the contractors. In addition, while the arrangement for the other school bus employees is not a direct pass-through, the DOE shares control over all school bus contractors' employees who participate in the Pension Fund because the DOE sets the significant terms and conditions of employment and reimburses the contractors for the fringe benefit expenses. Thus, for all school bus employees, the contractor acts an intermediary between the Pension Fund and the DOE for these pension obligations, and the DOE is acting "indirectly in the interest of an employer, in relation to an employee benefit plan." Therefore, the DOE would be treated as an "employer" for withdrawal liability purposes.

To help ensure that all affected parties are aware of this potential upheaval, the Pension Fund will be notifying all participating school bus contractors and the 13,000 Plan participants and beneficiaries so that they are aware of the pending risk to the Pension Fund's long-term funding and retirement security it provides.

We strongly urge the DOE to reconsider its position on issuing school bus contracts without terms preserving and protecting the Pension Fund's contribution base. In the meantime, please immediately provide the Pension Fund with a list of the DOE contracts that have been subject to a bid (or that are expected to be bid before June 30, 2013) without the EPP and the identity of the current employers for those contracts.

Dennis M. Walcott, Chancellor
January 16, 2013
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Please feel free to contact me if you have any further questions.

Very truly yours,



Barry S. Slevin *BS*

BSS:PTE:SMG:jqf:4146

cc: Eric Goldstein (*via regular mail and electronic mail to egoldstein@schools.nyc.gov*)
Board of Trustees
Richard N. Gilberg, Esq.
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