

Legislative History for Connecticut Act

PA 15-188

SB989

House	7560-7563	3
Senate	2070-2073, 2262-2263	6
Labor & Public Employees	1603-1611	9
		18

Transcripts from the Joint Standing Committee Public
Hearing(s) and/or Senate and House of Representatives
Proceedings

Connecticut State Library

Compiled 2017

H - 1223

**CONNECTICUT
GENERAL ASSEMBLY
HOUSE**

**PROCEEDINGS
2015**

**VOL.58
PART 22
7297 - 7630**

/pt
HOUSE OF REPRESENTATIVES

351
June 2, 2015

House Calendar 654, Page 36, Favorable Report of
the Joint Standing Committee on Planning and
Development, Senate Bill 989 AN ACT CONCERNING
REEMPLOYMENT AND THE MUNICIPAL EMPLOYEES' RETIREMENT
SYSTEM.

DEPUTY SPEAKER RYAN:

Once again, Representative Tercyak, Chairman of
Labor and Public Employees, you have the floor, sir.

REP. TERCYAK (26th):

Thank you very much, Mr. Speaker, I appreciate
this opportunity and move for acceptance of the Joint
Committee's Favorable Report and passage of the bill
in concurrence with the Senate.

DEPUTY SPEAKER RYAN:

The question is acceptance of the Joint
Committee's Favorable Report and passage of the bill
in concurrence with the Senate. Representative
Tercyak, you continue to have the floor.

REP. TERCYAK (26th):

Thank you very much, Mr. Speaker. Last year this
bill, a bill accomplishing the same pretty much this
bill, made it through both Chambers of the Legislature
with only a single vote against it. This is about
retired municipal employees.

If you're a retired municipal employee and collecting a pension from the Municipal Employees' Retirement System up until a ruling that was recent when we first start this fight, but now it's a couple years old, you were eligible to collect your retirement as long as you were, even if you were again municipally employed, as long as your job and you were not in the municipal employees retirement system again.

We've had some disagreement with the folks who run this. We believe the system that does pay people when they're retired is fair and this will take care of that disagreement that we've been having with the retirement system.

It makes it clear that if a person does not participate in the Municipal Employees Retirement System during the period of his or her re-employment that they can collect their pension that they have earned from the Municipal Employees Retirement System.

And with that, I hope this will be popular.

Thank you very much, Mr. Speaker.

DEPUTY SPEAKER RYAN:

Thank you, Representative. Representative Rutigliano of the 123rd, sir, you have the floor.

/pt
HOUSE OF REPRESENTATIVES

353
June 2, 2015

REP. RUTIGLIANO (123rd):

Thank you, Mr. Speaker. Mr. Speaker, this is a non-controversial bill that makes minor and technical changes. It passed unanimously through Planning and Development and the Labor Committee, even with the support of a municipal union and I urge my members and our members to support the bill. Thank you, Mr. Speaker.

DEPUTY SPEAKER RYAN:

Thank you, Representative. Will you remark further on the bill? Will you remark further on the bill?

If not, will staff and guests please come to the Well of the House. Will the members take their seats. And the machine will be opened.

CLERK:

The House of Representatives is voting by roll,
members to the Chamber. The House of Representatives is voting by roll, members to the Chamber.

[pause]

DEPUTY SPEAKER RYAN:

Have all members voted? Have all members voted?

/pt
HOUSE OF REPRESENTATIVES

354
June 2, 2015

Will the members please check the board to see if their vote is properly cast.

If all members have voted the machine will be locked. The Clerk will take a tally. The Clerk will announce the tally.

CLERK:

Senate Bill 989 in concurrence with the Senate

Total Number Voting 141

Necessary for Passage 71

Those voting Yea 141

Those voting Nay 0

Absent and not voting 10

DEPUTY SPEAKER RYAN:

The bill passes. [gavel] Will the Clerk please call Calendar No. 661.

CLERK:

On Page 37, Calendar No. 661, Favorable Report of the Joint Standing Committee on Judiciary, Substitute Senate Bill No. 99 AN ACT CONCERNING NEW CAR DEALERS AND INFORMATION REGARDING THE MAGNUSON-MOSS WARRANTY ACT, THE UNAUTHORIZED ACCESS OF COMPUTER DATA, WRITTEN NOTICE FOR HOMEMAKER OR COMPANION SERVICE REGISTRIES AND BUSINESSES THAT MAKE CERTAIN UNSOLICITED AND INTENTIONALLY MISLEADING TELEPHONE CALLS TO CONSUMERS.

S - 685

**CONNECTICUT
GENERAL ASSEMBLY
SENATE**

**PROCEEDINGS
2015**

**VOL. 58
PART 7
1971 - 2310**

/rc
SENATE

64
May 27, 2015

CLERK:

House Bill 6100

Total Number Voting	36
Necessary for Passage	17
Those voting Yea	36
<u>Those voting Nay</u>	<u>0</u>
Absent/not voting	0

[applause]

THE CHAIR:

Senator Duff. Do you have an announcement, sir?

SENATOR DUFF:

Thank you, Madam President. Madam President, I would move for suspension and for immediate transmittal to the Governor.

THE CHAIR:

Seeing no objections, so ordered, sir. Thank you.

SENATOR DUFF:

Thank you, Madam President.

THE CHAIR:

Mr. Clerk.

CLERK:

On page 41, Calendar 230, Senate Bill No. 989, AN ACT CONCERNING REEMPLOYMENT AND THE MUNICIPAL EMPLOYEES' RETIREMENT SYSTEM; FAVORABLE REPORT OF THE COMMITTEE ON LABOR AND PUBLIC EMPLOYEES.

THE CHAIR:

Senator Osten. Senator Osten. Please.

SENATOR OSTEN:

/rc
SENATE

65
May 27, 2015

Thank you very much, Madam President. Madam President, I move acceptance of the Joint Committee's Favorable Report and passage of the bill.

THE CHAIR:

Motion's on acceptance and passage. Will you remark, ma'am?

SENATOR OSTEN:

Thank you very much, Madam President. Madam President, this is a piece of legislation that we've tried last year and are hoping it'll be successful this year. Under current law, former municipal employee collecting retirement benefits from the Connecticut Municipal Employees Retirement System was stopped collecting benefits if he or she returns to work for his or her former municipal employer or any other municipality that participates in what is called the MERS program for more than 20 hours per week or 90 days per year.

This bill allows such an employee to continue to collect benefits as long as he or she does not participate in MERS during the reemployment. MERS is a state administered pension system for municipal employees that municipalities can opt in to by agreeing to meet specific financial requirements.

Participating municipalities are not required to enroll all of their employees and can allow some of their employees or unions to participate while others do not. By law certain municipal employees, including teachers, cannot participate in MERS. I urge adoption of this bill.

THE CHAIR:

Motion's on - will you remark? Senator Hwang. Good afternoon, sir.

SENATOR HWANG:

Good afternoon, Madam President, through you, a couple questions to the proponent please.

/rc
SENATE

66
May 27, 2015

THE CHAIR:

Please proceed, sir.

SENATOR HWANG:

Thank you. The - Does this bill have a fiscal note attached to it? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN:

Through you, Madam President. This bill is not anticipated to result in any fiscal impact to either municipalities or the State.

THE CHAIR:

Senator Hwang.

SENATOR HWANG:

Thank you, Madam President. A second follow-up is the MERS program and its administrators; did they pose any objection to this new wrinkle to this program? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN:

Through you, Madam President, not to my knowledge.

THE CHAIR:

Senator Hwang.

SENATOR HWANG:

/rc
SENATE

67
May 27, 2015

Thank you very, very much. One last question, could the good Senator explain why teachers are excluded from this program? Through you, Madam President.

THE CHAIR:

Senator Osten.

SENATOR OSTEN:

Through you, Madam President. They participate in another form of pensions.

THE CHAIR:

Senator Hwang.

SENATOR HWANG:

Thank you, and I want to thank the good Senator for bringing up the bill and I offer my support in this in giving an option for an individual that wants to re-enter into the labor force and on a part-time basis to be afforded the protection of the pension reform so - thank you, ma'am.

THE CHAIR:

Will you remark further on this bill? Will you remark further on this bill? If not - Senator Osten.

SENATOR OSTEN:

If there are no objections I would urge that this be removed to the Consent Calendar.

THE CHAIR:

Seeing no objections, so ordered, ma'am. Mr. Clerk.

CLERK:

On page 11, Calendar 442, substitute for Senate Bill No. 1080 AN ACT CONCERNING THE DEPARTMENT OF REVENUE SERVICES. Favorable Report of the Committee on Finance.

/rc
SENATE

256
May 27, 2015

THE CHAIR:

Thank you. Will you remark on the bill as amended?
Senator Larson.

SENATOR LARSON:

Thank you, Madam President. If there's no objection
I'd ask this bill amended and placed on the Consent
Calendar.

THE CHAIR:

Seeing no objection; so ordered, sir. Senator Duff.

SENATOR DUFF:

Thank you, Madam President. If the Clerk could please
call the items on the Consent Calendar and then we can
have a vote on Consent Calendar please.

THE CHAIR:

Thank you, sir. Would the Clerk please call the items
on the Consent Calendar?

CLERK:

On page 2, Calendar 91, Senate Bill No. 752. On page
7, Calendar 384, House Bill 6724. Page 8, Calendar
385, House Bill 6812. And on page 11, Calendar 450,
House Bill 6815. Page 13, Calendar 462, House Bill
6800. And on page 17, Calendar 488, House Bill 6575.
On page 18, Calendar 499, House Bill 6917.

Page 22, Calendar 519, House Bill 6733. Page 37,
Calendar 136, Senate Bill 882. And page 39, Calendar
165, Senate Bill 312. On page 40, Calendar 191, Senate
Bill 4814. Also on page 40, Calendar 188, Senate Bill
888. Page 41, Calendar 230, Senate Bill 989. Page 42,
Calendar 255, Senate Bill 475. And on page 46,
Calendar 367, Senate Bill 1108.

THE CHAIR:

Thank you, sir. Would the Clerk please call a pendency
of roll call vote?

LB418

/rc
SENATE

257
May 27, 2015

CLERK:

Immediate roll call has been ordered in the Senate.
Immediate roll call on today's Consent Calendar has been ordered in the Senate.

[pause]

THE CHAIR:

Members, please check the roll call vote. The machine will be locked. Clerk will announce the tally.

CLERK:

On the Consent Calendar for today

Total Number Voting	36
Necessary for Adoption	17
Those voting Yea	36
Those voting Nay	0
Absent/not voting	0

THE CHAIR:

Consent Calendar is adopted. [gavel] Mr. Majority Leader.

SENATOR DUFF:

Thank you, Madam President. First, I will yield to points of personal privilege or any announcements. I would ask that members stay in the Chamber. I do have a few important announcements before we leave for the morning.

THE CHAIR:

Seeing no announcements - Senator Kennedy, do we have an announcement? Seeing none, Senator Duff.

SENATOR DUFF:

Thank you, Madam President. It is our intention tomorrow to caucus at noon tomorrow on our side of the aisle; probably the same on the other side. We'll have

**JOINT
STANDING
COMMITTEE
HEARINGS**

**LABOR AND
PUBLIC
EMPLOYEES
PART 4
1274 – 1713**

2015

TESTIMONY OF ERIC BROWN
STAFF COUNSEL
CONNECTICUT COUNCIL OF POLICE UNIONS
AFSCME, COUNCIL 15

BEFORE THE LABOR AND PUBLIC EMPLOYEES COMMITTEE OF
THE CONNECTICUT GENERAL ASSEMBLY

MARCH 3, 2015

Ladies and Gentlemen of the Committee, my name is Eric Brown and I am staff counsel with AFSCME Council 15, a labor union representing the interests of almost 4000 police officers in 60 municipal communities throughout Connecticut. Council 15 submits this testimony today in support of:

S.B. No. 989 (RAISED) AN ACT CONCERNING REEMPLOYMENT AND
THE MUNICIPAL EMPLOYEES' RETIREMENT SYSTEM.

We speak in support of SB 989, which is needed to clean up an administrative anomaly in the interpretation of the statute which has suddenly changed the way the Retirement Commission interprets when and how a disability under the MERS system should be approved. Until 2011, employees from a MERS municipality who retired due to a qualifying disability, would be allowed to find other work if they were disabled from performing the duties of the job they originally held. So a police officer who retired on a disability could not go work for another town as a police officer, or perform similarly strenuous work. But recently the pension board has determined that so long as a disabled individual could perform any job in the town, even if the job is not available, then he is not eligible for a disability. This interpretation essentially prohibits any individual from retiring under a disability and it is not what has been intended under the statute. The change in interpretation occurred without any policy change by this Legislature. It occurred as a result of fiat by counsel in the Retirement Services Division of the Office of the State Comptroller. The Attorney General, by opinion issued on November 2, 2012¹ has laid out the genesis of the change in interpretation, and has further recommended that the Commission revert to the pre-2011 interpretation. This Legislature, absent some clear change in public policy, should require that the Commission revert back to the pre-2011 interpretation as the Attorney General has suggested is proper.

Thank you for your consideration. We urge your support of SB 989

Enclosure

¹ See the Opinion of the Attorney General dated November 2, 2012 to Peter R. Blum, Chairman, State Employees Retirement Commission.

GEORGE C. JUPSEN
ATTORNEY GENERAL



55 Elm Street
P.O. Box 120
Hartford, CT 06111-0120

Office of The Attorney General
State of Connecticut

November 2, 2012

Peter R. Blum, Chairman
State Employees Retirement Commission
55 Elm St.
Hartford, CT 06106

Dear Chairman Blum:

You have requested this office's opinion regarding the proper construction of statutory language governing disability retirements under the Connecticut Municipal Retirement System ("CMERS"). Specifically, you have asked us to interpret the meaning of the phrases "permanently and totally disabled," "gainful employment," and "in the service of the municipality" as contained in Conn. Gen. Stat. § 7-432. In addition, you have inquired whether an employee's "disability" should be determined on a physical/medical standard, or whether it should be determined on an availability of employment standard. Finally, you have asked about the circumstances in which an individual who is a CMERS disability retiree (or any retiree) may continue to receive retirement benefits if gainfully employed for twenty or more hours per week.

In offering an interpretation of these statutory provisions, however, we would not be writing on a blank slate. The information provided to this office indicates that recently, in May, 2011, the Retirement Services Division of the Office of the State Comptroller ("Division") altered the way in which it interprets and administers the statutory language governing municipal disability retirements and reemployment rules, creating some confusion among applicants, staff and Commission members. To address your question properly, we must first review the historical backdrop in light of this recent change.

CMERS has been serving Connecticut's municipalities since the 1940s by administering the collection, reconciliation and disbursement of municipal pension contributions to employees who are part of a participating CMERS

Peter R. Blum, Chairman
 State Employees Retirement Commission
 Page 2

entity.¹ Along with administering pension contributions and disbursements, CMERS manages the application and eligibility process for individuals who seek to retire due to a disability. Your inquiries focus on both eligibility for a disability retirement and the relationship between receipt of retirement benefits and reemployment, therefore requiring us to review Conn. Gen. Stat. §§ 7-432, 7-438.

Connecticut General Statutes § 7-432 provides in relevant part:

Any member shall be eligible for retirement and for a retirement allowance who has completed at least ten years of continuous service if he becomes permanently and totally disabled from engaging in any gainful employment in the service of the municipality. For purposes of this section, "gainful employment" shall not include a position in which a member customarily works less than twenty hours per week. If such disability is shown to the satisfaction of the Retirement Commission to have arisen out of and in the course of his employment by the municipality, . . . he shall be eligible for retirement irrespective of the duration of his employment. Such retirement allowance shall continue during the period of such disability. The existence and continuance of disability shall be determined by the Retirement Commission upon such medical evidence and other investigation as it requires

(Emphasis added). In addition, Connecticut General Statutes § 7-438 provides in relevant part:

(a) Any member retired under this part² who again accepts employment from this state or from any municipality of this state

¹ Not all municipal employees participate in CMERS or are governed by its provisions. Conn. Gen. Stat. § 7-425(2) defines "participating municipality" to mean "any municipality which has accepted (CMERS), as provided in section 7-427." In turn, Conn. Gen. Stat. § 7-427(a) governs how a municipality accepts CMERS: "Any municipality . . . may, by resolution passed by its legislative body and subject to such referendum as may be hereinafter provided, accept this part as to any department or departments of such municipality as may be designated therein The acceptance of this part as to any department or departments of a municipality shall not affect the right of such municipality to accept it in the future as to any other department or departments. . . ." Thus, some municipalities have accepted CMERS and some have not; also, some municipalities that have accepted CMERS have not accepted it as to every department within the municipality.

² The phrase "any member retired" includes those who qualify for a regular retirement under Connecticut General Statutes § 7-428, and those who qualify for a disability retirement under Connecticut General Statutes § 7-432, as both statutes are contained in Part II of Chapter 113 for the General Statutes.

Peter R. Blum, Chairman
State Employees Retirement Commission
Page 3

other than a participating municipality, shall continue to receive his retirement allowance while so employed, . . . but any such member shall not be eligible to participate or be entitled to credit in any municipal retirement system for the period of such municipal employment:

(b) If a member is retired under this part and again accepts employment from the same municipality from which he was retired or any other participating municipality, he shall be eligible to participate, and shall be entitled to credit, in the municipal employees' retirement system for the period of such municipal employment. Such member shall receive no retirement allowance while so employed except if his services are rendered for not more than ninety working days in any one calendar year³

(Emphasis added).

As explained to this office, before its approximate 2011 revised statutory interpretation, the Division required the following materials as part of the application for a disability retirement: (1) a disability application; (2) medical progress reports and diagnostic results; (3) an accident report, if any; (4) a Form CO-649 completed by the applicant's physician; and (5) correspondence from the municipality indicating whether any other employment for the applicant was immediately available.⁴ This information was forwarded to the Medical Examining Board ("MEB") for a strictly record review. Based on that record, the MEB determined whether the applicant was "permanently and totally disabled" from the position and would provide a list to the State Employees Retirement Commission ("Commission") for a final decision. During this time, the Division interpreted the state's disability standard -- "permanently and totally disabled from engaging in any gainful employment in the service of the municipality" -- to mean that 1) the applicant could not physically perform the duties of the position he or she was applying to retire from, and 2) no alternate position was immediately

³ Conn. Gen. Stat. §§7-432 and 7-438 were amended in June 2011. See 2011 Conn. Pub. Acts No. 11-251. Because these changes do not alter the legal analysis, this opinion will reference the current statutes.

⁴ If a position were available, the municipality forwarded the available job posting information to the Medical Examining Board for review.

Peter R. Blum, Chairman
State Employees Retirement Commission
Page 4

available in the municipality that was covered by MERS and that the applicant was qualified to perform.

As further explained to this office, from approximately the 1990s (and perhaps before) until 2011, the Division permitted retirees to return to work without implicating their retirement benefits if: 1) the retiree worked for a private employer; 2) the retiree worked for the same municipality or another municipality as long as the position was not covered by CMERS; or 3) the retiree worked for the same municipality in any position covered by CMERS but the position was for ninety days or less per calendar year, or under twenty hours per week.

Finally, notwithstanding the statute's admonition that "[t]he existence and ~~continuance~~ of disability shall be determined by the Retirement Commission upon such medical evidence and other investigation as it requires" (emphasis added), no follow-up procedures have been in place to monitor whether disability retirees continue to be disabled. Conn. Gen. Stat. § 7-432. We have, however, learned anecdotally that the Division and the Commission have occasionally -- but not often -- come into some information prompting action to revoke a disability retirement.⁵

In 2011, § 7-438 was changed to include the following language: "Such member shall receive no retirement allowance while so employed except if (1) such employment is for less than twenty hours per week, or (2) his services are rendered for not more than ninety working days in any one calendar year." (Emphasis added.) 2011 Conn. Pub. Acts No. 11-251. In addition, § 7-432 was also amended to include the following language: "For purposes of this section, 'gainful employment' shall not include a position in which a member customarily works less than twenty hours per week." *Id.*

At about the same time that the Legislature made these changes to §§ 7-432, 7-438, the Division altered its interpretation and application of both §§ 7-432, 7-438. Specifically, as explained to this office, the information now required

⁵ We suggest that the Commission be more rigorous in determining whether a disability "continues." Although the Legislature clearly contemplated that certain retirees -- including disability retirees -- might continue to work after being granted a disability retirement, in some cases certain types of employment might constitute evidence of the lack of the "continuance of [such] disability." We are available to discuss whether it would be advisable or appropriate to promulgate regulations, for example, to address a process for determining "[t]he existence and continuance of disability."

Peter R. Blum, Chairman
State Employees Retirement Commission
Page 5

by the Division to process a disability retirement application consists of the following materials: (1) a disability application; (2) medical progress reports and diagnostic results; (3) an accident report, if any; (4) a "Physicians Statement" from the treating physician(s); (5) a "Members Statement" from the applicant; and (6) an "Employer Statement," which addresses other job availability. The MEB still limits its review to the paper record, and it provides a list to the Commission for a final decision.

However, the MEB no longer employs the same disability standard, which as stated above had been: 1) the applicant could not physically perform the duties of the position he or she was applying to retire from, and 2) no alternate position was immediately available in the municipality that was covered by CMERS and that the applicant was qualified to perform. Rather, Division staff informed this office that the MEB now considers whether the applicant's condition prevents him or her from performing any work at all for more than twenty hours per week. That is, the MEB will not approve a disability application if there is any other position within a municipality that the applicant could perform, regardless of whether that alternate position is 1) available; 2) a position the applicant is qualified or trained to perform; or 3) within a CMERS unit or not. Not surprisingly, this new standard has resulted in more denials of disability retirements, and more particularly has resulted in denials to applicants with conditions that likely would have qualified them for disability retirements in the past.

The Division has also altered its interpretation of its "return to work rules," limiting a retiree's return to work for a participating municipality to ninety days or less per calendar year, or twenty hours per week, regardless of whether or not the position is covered by CMERS. This restriction applies to any municipality that contains any group of employees covered by CMERS. A retiree may still return to work for any employer who has no employee covered by the CMERS; however, if the individual works for a municipality, he or she may not participate in the pension plan of the municipality. Disability retirees clearly now are limited to twenty hours or less per week "during the period of such disability." 2011 Conn. Pub. Acts No. 11-251.

Having administered the statutes as newly interpreted for more than a year, the Commission has now essentially asked my office to opine on whether the "historical" interpretations or the "new" interpretations are correct.

Peter R. Blum, Chairman
State Employees Retirement Commission
Page 6

I note that the statutes, which have been amended over the years and which implicate competing policies of providing for disabled employees while protecting pension funds, are not "models of clarity." See Foley v. State Elections Enforcement Commission, 297 Conn. 764, 782 (2010). In my view, neither the agency's historical interpretations of the statutes nor its revised interpretations are clearly wrong. Under these circumstances, the Legislature not the Attorney General is better suited to choose among competing agency-approved interpretations.

The Division and the Commission changed their interpretations without any intervening guidance from the Legislature. These changed interpretations are particularly problematic because they can result in -- and perhaps have already resulted in -- disparate treatment of individuals based only on the date the conditions arose that gave rise to their disability retirement applications, without any direction from the legislature of a need to alter the administration of this program prospectively. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). Given the prior interpretation and administration of the statutes discussed above, many municipal employees, and their bargaining representatives, had settled expectations about what the CMERS system would afford them if they became disabled, or retired from a position and sought to continue working. This has likely affected choices individuals have made for themselves (such as purchasing or not purchasing insurance), as well as choices bargaining representatives have made for their membership (such as negotiating for certain benefits instead of other benefits).

At least two principles suggest that an agency should not lightly undertake to alter its consistent interpretation of laws it is charged to administer. First, "in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute." Longley v. State Employees Retirement Commission, 284 Conn. 149, 164 (2007). "It is true that the legislature is presumed to be aware of the interpretation of a statute and its subsequent nonaction may be understood as a validation of that interpretation." Berkley v. Gavin, Commissioner of Revenue Services, 253 Conn. 761, 776-77 n.11 (2000) (Internal quotation marks omitted). A court would employ the doctrine of legislative acquiescence "not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not

Peter R. Blum, Chairman
State Employees Retirement Commission
Page 7

to amend the specific provision of the statute at issue." *Id.*; see also *State v. Salamon*, 287 Conn. 509, 525 (2008) ("[l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute").

In this instance, in June 2011, the legislature amended slightly the language of §§ 7-432, 7-438; however, it was silent with respect to defining the language "totally and permanently disabled," "gainful employment," or "in the service of the municipality." See 2011 Conn. Pub. Acts No. 11-251. As early as the 1990s, the Division articulated its interpretation of these statutes to permit a disability retirement recipient to work for a municipality (even the same municipality), as long as it was in a non-CMERS unit. The Legislature is presumed to have been aware of the long-standing agency interpretation/application of the statutes prior to the 2011 legislative change. Therefore, its "nonaction" with respect to defining the statutory language that is the basis of your request "may be understood as a validation of that [long-standing] interpretation." *Berkley, supra*, 776-77 n. 11. The Division's past practice apparently met with the Legislature's approval as it did not amend any other language within the statutes.

Second, "an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." *Longley supra*, 164; see also *Department of Public Safety v. POIC*, 298 Conn. 703, 717 (2010). In the absence of a defined agency declaration regarding its practice, and a limited history with respect to application of its practice, courts are reluctant to accord such deference to the agency. See *Connecticut Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services*, 244 Conn. 378, 390 n. 18 (no deference warranted to agency interpretation when agency failed to make public statement of its practice, and four years "hardly constitutes a 'time-tested' agency interpretation"). As a result, if an applicant were to appeal a denial of retirement benefits and contest the Commission's interpretation of any of these terms, there is a serious question as to whether a court would afford deference to the Commission's new legal interpretations. Such a lack of deference might very well be appropriate both because the Commission's new interpretation is not "time-honored," and its previous interpretation was.

Both of the maxims of statutory construction recited above militate against any new interpretations of the relevant statutes without legislative direction to undertake such a re-interpretation. Whether and under what circumstances a

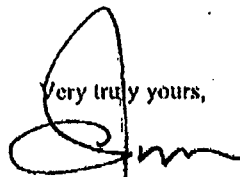
Peter R. Blum, Chairman
State Employees Retirement Commission
Page 8

municipal employee ought to be eligible for a disability retirement at the Fund's expense is a matter of state policy. Just as it "is decidedly not the role of [the] court to make the public policy determinations"; neither is it for an executive agency to do the same. See Rafanopol v. Ramey, 299 Conn. 681, 713 (2011) ("The legislature will be required to grapple with numerous questions implicating significant public policy issues--that body, with the ability to hold public hearings and seek out expert assistance, is the appropriate one to make such public policy determinations."). An executive agency - like a court - must determine from the words of the statute the legislature's intention in carrying out that articulated public policy. "In areas where the legislature has spoken, the primary responsibility for formulating public policy must remain with the legislature." State v. Wilhelm, 204 Conn. 98, 103 (1987).

Thus, we cannot counsel you that it is appropriate to deviate from your agency's historical applications of the Commission's statutes without legislative direction on these issues. My advice is that your agency should return to administering disability retirement applications and return-to-work rules based on pre-2011 interpretations. Any change to the applications of the statutes discussed above - which might very well be in order - should come only after legislative action.

We remain available to address your questions as necessary.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL