

**MINUTES OF THE SPECIAL MEETING OF THE BOARD OF TRUSTEES  
ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM  
APRIL 30, 2014**

A special meeting of the Board of Trustees of the Arkansas Public Employees Retirement System was held on Wednesday, April 30, 2014 at 9:00 a.m., in the Conference Room, 124 West Capitol, Little Rock, Arkansas. Mr. Artee Williams presided.

**QUORUM PRESENT:**

Mr. Williams recognized the presence of a quorum.

**BOARD MEMBERS PRESENT:**

Mr. Artee Williams (State Employee Member), *Chair*, Director, Dept. of Workforce Services  
Judge Mike Jacobs (County Employee), Clarksville, AR  
Ms. Ouida Wright (State Employee Member), Conway, AR  
Mr. Bill Gaddy (State Employee Member), Little Rock, AR  
Mr. Wes Goodner, State Treasurer Deputy (*proxy*)  
Ms. Janet Harris, Deputy State Auditor (*proxy*)  
Dr. John Shelnett, Dept. of Finance and Administration (*proxy*)  
Ms. Gail H. Stone (Executive Director), APERS

**BOARD MEMBERS ABSENT:**

Ms. Carol Bevis, (Other, Non-State Employee), Little Rock, AR  
Mayor Steve Northcutt (City Employee), Malvern, AR  
Hon. Richard Weiss (Ex-Officio Member), Dept. of Finance and Administration  
Hon. Charlie Daniels (Ex-Officio Member), State Auditor  
Hon. Charles Robinson (Ex-Officio Member), State Treasurer

**VISITORS PRESENT:**

Mr. Randy Hall, Attorney for the Plaintiffs  
Mr. Thomas Nichols, Attorney for the Plaintiffs  
Mr. Michael Heister, Attorney for Union County  
Mr. Tom Allen, Attorney for Woodruff County  
Mr. F. Thomas Curry, Attorney for Woodruff County Health Center  
Mr. Burt Newell, Attorney for Woodruff County Health Center  
Mr. Charles Dallas, Woodruff County Judge  
Mr. Gary Pritsch, Woodruff County Nursing Home  
Mr. Bari Cain, Woodruff County Nursing Home  
Mr. Paul Waddell, Attorney for Craighead and Lawrence County  
Mr. Justin Parkey, Attorney for Craighead and Lawrence County  
Mr. Dale Freeman, Lawrence County Judge  
Mr. Josh Bryan, Administrator Lawrence Health Services  
Mr. George Fray, Interim President, Lawrence Memorial Hospital  
Mr. Earnest Briner, V. P. Support Services, Lawrence Memorial Hospital  
Mr. Gary Green, Attorney  
Mr. Jason Owens, Attorney  
Ms. Ka Tina Hodges, Attorney General's Office  
Mr. Chris Villines, Association of Arkansas Counties  
Mr. Wes Fowler, Association of Arkansas Counties  
Ms. Karen Clark  
Ms. Lora Golden  
Mr. Ed Hill  
Mr. Mike Lofton  
Ms. Sandra Haynes, Accountant, Hudson Memorial Nursing Home, Union County  
Mr. Bill Yutzy, Administrator, Hudson Memorial Nursing Home, Union County  
Mr. Harold Copenhaver, State Representative-District 58 (*left after 30 minutes*)  
Mr. Dale French, Court Reporter

**STAFF PRESENT:**

Ms. Michele Williams, APERS Deputy Director  
Mr. Jay Wills, APERS Attorney Specialist  
Ms. Linda McGrath, APERS Administrative Specialist

**NEWS MEDIA NOTIFIED:**

A letter of notification of the Arkansas Public Employees Retirement System Board meeting was sent to the Arkansas Democrat-Gazette, the Associated Press, Television Station KLRT/FOX16, Radio Station KARN, and Radio Station KAAY. This letter of notification is pursuant to A.C.A 25-19-101 (Act 93 of 1967) as amended-The Freedom of Information Act.

**RECOGNIZE RE-APPOINTMENTS OF MR. WILLIAMS & MS. BEVIS:**

Mr. Stone notified the Board members that the Governor had re-appointed Mr. Williams and Ms. Bevis to the APERS' Board. Ms. Bevis' new term expires on March 9, 2018 while Mr. Williams' re-appointment runs through March 9, 2020.

**MINUTES:**

Prior to the Board meeting, copies of the Minutes from the meeting of February 19, 2014 were mailed to each APERS Board member for review. On a motion made by Ms. Harris and seconded by Mr. Gaddy, the Minutes were approved as presented.

**COUNTY NURSING HOME MEMBERSHIP REQUEST HEARINGS FOR CRAIGHEAD, LAWRENCE AND UNION COUNTIES :**

Mr. Wills laid out the basis for the hearing, noting there were two general subjects, although both pertained to the same legal matter. He explained that five applicants from three different nursing homes contend that they should have been deemed "county employees" for purposes of APERS' membership. The Craighead, Lawrence and Union County Nursing Home did not regard them in such a manner. Approximately a year ago, these five individuals applied for membership in APERS and since there is litigation involved, council for the respective parties has been very good about providing all the information requested or that they thought might be helpful and relevant. Mr. Wills stated that regardless of the Board's decision today, there would probably be an appeal filed with the Circuit Court under the Administrative Procedure Act.

After introductions, Mr. Wills stated that he would make the presentation for Staff. He noted that Ms. Ka Tina Hodges from the Attorney General's Office was in the room, and she would assist Mr. Williams in the resolution of any evidentiary questions that might come up. Mr. Wills noted that all the exhibits had been previously stipulated. Mr. Hall would be representing the five individuals and after his presentation, the Board would be free to ask questions of him. Once Mr. Hall had satisfied everyone, the three Nursing Homes would have a chance to present their side along with calling any witnesses they felt were needed and answer questions from the Board. At the conclusion of all presentations, the record would be closed and the Board would be asked to resolve the issue if these five applicants are county employees who should have been enrolled in APERS membership when they were hired by these nursing homes.

Mr. Wills polled the room to see if there were any objections to the notice of hearing, place or any procedural objections up to that point and hearing none, he continued. After his preamble, Mr. Wills introduced Staff Exhibit #1- A Notice of Hearing addressed to Mr. Randy Hall, Esq. dated April 7, 2014 so it would be included in the record. Staff Exhibit #2 was Ms. Stone's determination that Mr. Hall's five clients did not meet the requirements for APERS' membership in a letter dated April 18, 2014. Staff Exhibit #3 was a memo from Mr. Wills that he had prepared under Ms. Stone's direction addressing the legal issues as he perceived them. There were no objections to any of the exhibits.

Regarding Staff Exhibits #2 and #3, Mr. Wills came to the conclusion that in order to be a county employee who is eligible for APERS membership, there had to be evidence that applicant's compensations were payable out of appropriated funds. In reading of all the material provided, Mr. Wills stated he failed to see where appropriations from the county had been made and subsequently used for compensation of nursing home employees. He admitted that he found several instances where the counties had made appropriations, but in following up on the distribution of those funds, it was apparent that they were construction loans that were paid back to the counties. Mr. Wills determined that the most logical path was to refer to the APERS' definitions of members and appropriately concluded that these applicants were not entitled to APERS membership. Mr. Wills affirmed that he and Ms. Stone had thoroughly analyzed and discussed this issue before she rendered her determination that is being appealed here today.

Judge Jacobs inquired if the facts in these five cases were any different than what had transpired in Montgomery County over a year ago and Mr. Wills admitted they were. He stated that in Montgomery County they had found a pretty strong trail of appropriations from the county to the nursing home for operating expenses. Staff had not made a firm determination since Montgomery County was strenuously arguing that none of the funds were used for payroll and in the interim Mr. Hall had filed suit. Montgomery County got a judicial determination that a statute on which the county relied upon to avoid APERS membership was appropriate and no one had appealed that decision. Montgomery County, however, wanted assurances from APERS that based upon that Judges decision, the retirement system would not come back at a later time and demand payment for those employees.

With no further questions, Mr. Wills stepped away from the table; Mr. Hall and Mr. Thomas Nichols, Attorney for the Plaintiffs, took his place before the Trustees. Mr. Hall began by distributing packets for each of the Trustees that contained selected statutes he wished the Board to follow during his argument. He noted that each county under discussion had formed an administrative board under Arkansas law, and it was this board that was overseeing the operations of their respective nursing home. Following the law with respect to administrative boards, he cited A.C.A §14-14-705 as providing the authority for a quorum court to form an administrative board. He noted that the sole reason that an administrative board may be formed is for the conduct of county affairs. Mr. Hall assured the Board that the sole reason these administrative boards had been formed was to oversee their respective county nursing homes.

Continuing on, Mr. Hall cited parts of §14-14-705, stating it indicated that the county administrative board shall be an agency of county government. He concluded the General Assembly had declared that these administrative boards are agents of the county and occupied the same status as the county. He then drew from an Arkansas Supreme Court decision handed down February 7, 2013 that said "In statutory construction, we are obligated to interpret the various sections of our code in a way that harmonizes with other related sections... giving effect to the specific statute over the general."

Going back to the county government code, Mr. Hall called up A.C.A §14-14-1206 which defined a county employee as "any individual or firm providing labor or service to a county for salary, wages or any other form of compensation" and that county government includes boards. Thus an employee of a county board is an employee of the county.

In A.C.A §14-14-805, Mr. Hall noted that the Legislature has denied a quorum court any right to implement retirement legislation, charging that retirement was left up to APERS. Then he pointed out in the same section that all benefits for all county employees shall be uniform in nature. Mr. Hall commented that two of the nursing homes under scrutiny had adopted their own private retirement plans, which were substantially less than the benefits APERS' members enjoyed.

Mr. Hall summarized his argument by reminding the Trustees that the statute provided for county employees to all have equal benefits and that retirement legislation was off the table as it was already administered by APERS.

Changing direction, Mr. Hall reviewed several definitions from the APERS statutory framework from A.C.A §24-4-101. He noted that "County" included all *agencies*, offices, departments, *boards*, commissions and county-supported institutions that are duly constituted agencies of the county. Clearly, the Nursing Home Boards fell under the definition of "County". Furthermore, §24-4-101(31) defines "participating public employer" to include any county boards. Continuing in the same statute, he pointed out that "employee" was again defined as "employees of a board" or "whose compensations were or are payable from funds appropriated by the public employer". Mr. Hall concluded that an employee of a county board, under this framework, would be deemed an employee of the county for purposes of APERS.

Continuing on, Mr. Hall stated, it got down to the issue of appropriations. Under the definitions, since the board *is* the county, if the board is paying the salaries of these employees, then there is an appropriation. He acknowledged that that there was no ordinance that stated a certain amount would be allocated to employee salaries, but that was because boards did not have ordinances, they pass resolutions. However, every year a budget was presented that

included salaries and the board approved that budget. Mr. Hall emphasized the question "Whose money is it?" he stated that most of these nursing homes were sitting on \$2-4 million in cash as a result of operations and that the County owns the land, building and the equipment inside the nursing home. The board does not have a lease or pay rent for the facility and yet they have issued revenue bonds from building repair/improvements. He felt this behavior answered the question that it was county money, since the county was issuing the revenue bonds. Mr. Hall proposed that if those nursing homes sold or shut down today, the monies would go back to the county, not the board members, thus reinforcing the idea they were county entities.

Mr. Hall directed the Board's attention to a list of APERS covered employers that listed Randolph County Nursing Home as a covered County agency and stated that if they were members, then Craighead, Lawrence and Union County Nursing Homes should be covered, as well.

Finally, Mr. Hall focused on the recently passed legislation, Act 737 of 2011, which allowed nursing homes that were owned but not operated by the counties to elect to exclude its members from the APERS system. The three nursing homes in question had all elected to opt out of the APERS system after the passage of this Bill. He opined that with the passage of this Act, the legislators had sent a clear message to APERS that they *were* employees or there would be no reason to opt out. Citing Section 2 in the Emergency Clause, "there is confusion as to whether A.C.A. Section 24-4-302 applies to nursing homes, assisted living facilities, and other health care facilities owned but not operated by the counties" implies that the General Assembly told APERS that these people are, in fact, county employees.

In summation, Mr. Hall quickly repeated a condensed version of his 14 argument points before taking any questions from the Trustees. Ms. Harris queried why "County-owned but not operated nursing homes" were not listed out specifically A.C.A §24-4-101 and Mr. Hall opined it might have to do with the timing of the original legislation back in the 1950s, while Act 737 had been written in 2011. He pointed out that these boards were created in response to Act 742 of 1977.

Ms. Stone inquired of any of these nursing homes in question had applied to the IRS for a private letter ruling determining whether they were instrumentalities of the state? Mr. Hall replied that IRS stated that no such entities exist, except for the private plan from Hudson Memorial (Union County). There was nothing on record with the Secretary of State for Hudson Memorial being a non-profit entity and he believed that Craighead and Lawrence County Nursing Homes listed "government" as the type of entity on their W-9.

Mr. Gaddy inquired about Randolph County's status and Mr. Hall admitted that had not gotten any further than confirming that an administrative board that runs the facility. He noted that all the nursing home lawyers had readily responded to FOIA requests, a fact which he felt confirmed they were public entities, since a private entity would be under no such compulsion.

With no further questions, Mr. Hall stepped away from the table and was replaced by Mr. Paul Waddell and Mr. Justin Parkey, Attorneys for Craighead and Lawrence County Nursing Homes.

After introductions, Mr. Waddell addressed the Board noted that APERS Board had been subjected to a lot of interesting comments and analysis, but it had no application to the issue at hand: the definition of an employee that can participate in APERS program. He complimented APERS General Counsel for drilling down on the law and answered the question in just two pages without any ambiguity. Mr. Waddell noted that the APERS Board had the responsibility to apply the law as it exists and APERS General Counsel had accurately researched the law. The statutes are very specific that the compensation of the employees would have to be through an appropriation by the county itself and that was not the case with either Craighead or Lawrence County Nursing Homes. He affirmed the revenue dollars used pay salaries and benefits came from Medicare and Medicaid; no form of employee compensation had been derived from County appropriations. Mr. Waddell stated that any appropriations received have been used for capital improvements *only*. This is an undisputed fact and thus none of the nursing home employees meet the definition of "county employee" and have membership in APERS. Mr. Waddell concluded his presentation by asking the Board members to affirm the

Executive Director's earlier determination based upon the research of APERS General Counsel.

Mr. Michael Heister approached the Board table next and introduced himself as the attorney for the Hudson Memorial Nursing Home located in Union County. He acknowledged the presence Mr. Bill Yutzy and Ms. Sandra Haynes, Administrator and Accountant for Hudson Memorial Nursing Home and stated that their presence was due to the life or death nature of this determination for the nursing home. Mr. Heister gave a short history of the institution and how it was founded over 50 years ago by local Mennonites.

The main issue the APERS Trustees needed to keep in mind when affirming the Executive Director's decision is that according to statute law, in the event of a conflict between a general and a specific statute, the specific statute controls. Mr. Heister noted A.C.A §24-4-101 and stated it was very clear who was and was not an APERS member. He complimented the Executive Director for not being distracted by the other statutes being thrown around making the correct initial decision.

The Board does not have to pretend that Act 737 just came out of nowhere; it was intended to clear up the confusion regarding nursing homes and other health care facilities owned, but not operated by the counties. Mr. Heister noted that this confusion had led to litigation against the counties which is the reason for implementing the emergency clause. He maintained that the only questions the Trustees needed to concern themselves with were: Is this a county-owned, but not operated facility and did they conduct the vote and submit it by the deadline. Mr. Heister then pointed out the specific evidence – a certified letter from the nursing home board of governors invoking Act 737 to APERS that was submitted in a timely fashion.

Mr. Heister outlined how the members of the Hudson Memorial Nursing Home Board of Governors were not considered county employees and did not collect any compensation from Union County for serving on the board. He continued to detail evidence that he felt proved the nursing home employees should never have been considered to be county employees. Finally, he pointed out an accounting report showing "statement of cash flow and "schedule of revenue" and noted that nowhere did these reports show any money coming from Union County. Mr. Heister reaffirmed his belief that the APERS' Executive Director was correct when she determined that the Hudson Memorial Nursing Home employees were not and never should have been considered county employees and urged the APERS Trustees to support her decision.

Mr. Hall's rebuttal centered on the nursing homes' cries that if this settlement was to go through, they would be bankrupt and they served vital county needs. He stated that playing "Robin Hood" at the expense of their employees was unjust and the nursing home staff was entitled to these benefits as "county employees.

With no further comments or questions from the lawyers, nursing homes, lawyers or Board members, Mr. Wills concluded the hearing and closed the record. After a short very deliberation, Judge Jacobs motioned to affirm the APERS' Executive Director's decision that the plaintiffs did not meet the criteria for being a "county employee" and thus be enrolled in APERS. He was seconded by Mr. Gaddy and the motion was approved unanimously.

Mr. Wills explained to all those in attendance the follow-up actions he would take and how to affect an appeal, if desired. There were no questions of the procedure.

#### LUNCH

The meeting reconvened after a short break.

#### WOODRUFF COUNTY HEALTH CENTER SETTLEMENT APPROVAL REQUEST:

Mr. Wills reminded the Board that Woodruff County Health Center had previously been involved in a settlement very similar to the ones the Trustees had heard today. The nursing home had previously reached an agreement with the applicants, contingent on the APERS Board's approval. He distributed copies of the settlement agreement to the Trustees.

Mr. Tom Curry addressed the Trustees and explained the actions he had taken after the initial lawsuit had been filed on the health center. After the motion to dismiss had been denied, he

calculated that a worst-case scenario could potentially bankrupt not only Woodruff County Nursing Home, but also Woodruff County itself. Not willing to risk such a loss, the nursing home board entered into an agreement for the sum of \$1.45 million to be paid over time, however there is a clause in the agreement that requires the APERS Board to approve the agreement. Mr. Curry explained that the nursing home could not risk having the APERS Board's decision being overturned in court at a later date and have it decided that the nursing home employees should have been reported to APERS as county employees. After paying out over \$1.45 million to its employees, the nursing home could ill-afford to turn around and pay APERS required employer contributions and late penalties. He wanted assurances from the APERS Board that regardless of the outcome of any potential appeal, APERS would leave the nursing home employees alone.

When queried regarding his opinion on the issue, Mr. Wills stated that the concern he had about all these county nursing home lawsuits was that if the determination was made by the courts that these workers were indeed county employees, then APERS's Staff would have no other choice but to go after the delinquent employers; quite a serious thing.

Ms. Stone said she had grave concerns on many levels over signing away Board's fiduciary duty. Her first issue was the construction of state governmental plans as determined by the IRS under 401(a). It starts with the employer, an instrumentality of the state in this instance, and their employees who qualify under the provisions of the retirement code, will be members of the retirement system. No employers have come forward in this instance; instead individuals have declared they should have been members. If APERS started allowing this to happen, the actuarial liabilities would get thrown out the window. This would also seriously erode APERS' tax-qualified status. Ms. Stone stated she felt like APERS (which is not a party to the lawsuit) was being used to threaten these nursing homes into handing over more money to their past and present employees.

Mr. Hall noted that this settlement agreement mirrored the one the Board had previously signed for Montgomery County Nursing Home. It also recognizes that Woodruff County properly opted out of Act 737 and finds that they are not employees for purposes of APERS. This settlement agreement will be entered into a court order, just as was done in Montgomery County, that will be non-appealable. He expressed confusion that the board had decided earlier in the meeting that three other similarly-situated, nursing homes' employees were not entitled to APERS benefits, but would not make the same determination on Woodruff County.

When questioned, Mr. Wills reminded the Board that they did sign-off on Montgomery County at the August 1012 Board meeting. Mr. Gaddy felt there were some differences between the two cases based on differences in county appropriations. The discussion continued on for several more minutes before Mr. Gaddy motioned to defer any action until the May meeting to give everyone a chance to review the transcripts. Mr. Goodner seconded and the motion passed.

**NEXT QUARTERLY BOARD MEETING:**

The next quarterly meeting is scheduled for Wednesday, May 21, 2014 at 9:00 a.m.

**ADJOURNMENT:**

There being no further business, the meeting was adjourned.

  
MR. ARTEE WILLIAMS, CHAIR

  
MS. GAIL STONE, EXECUTIVE DIRECTOR