

THE MANITOBA PENSION COMMISSION

IN THE MATTER OF: The Pension Benefits Act.
C.C.S.M. c. P-32, as amended;

AND IN THE MATTER OF: The University of Winnipeg
Pension Plan;

AND IN THE MATTER OF: an Order of the Superintendent of Pensions
dated November 17, 2006, made pursuant to
subsections 8(2) and 8(3) of The Pension
Benefits Act relating to the University of
Winnipeg Pension Plan;

AND IN THE MATTER OF: an appeal to the Pension Commission by the
University of Winnipeg Retirement Association
pursuant to subsections 8(6) and 8(7) of The
Pension Benefits Act.

FINAL DECISION

UNIVERSITY OF WINNIPEG RETIREMENT ASSOCIATION APPEAL

APPEARANCES:

The Commission: Robert Ziegler, Chairperson
Ramona Tkachuk, Vice Chair
Linda Zak
Debra Woodgate
Steve Gingera
Barbara Smith
Denis Fitzpatrick

Counsel for the Commission: George Ulyatt

For the Superintendent: Marjorie Webb

For the University of Winnipeg: G. Patrick Riley
Len J. Lucas
Valerie Gilroy

For the University of Winnipeg
Retirement Association: Grant Stefanson
Wesley Stevens
Brent Stearns

For the University of Winnipeg
Faculty Association: Shannon Carson

For the Association of Employees
Supporting Education: Allan Forran
Erin McNicol

FINAL DECISION

These proceedings relate to the University of Winnipeg Pension Plan (Plan) and an Order of the Superintendent dated November 17, 2006. While two appeals were heard simultaneously, it was clarified from the outset that both would be determined on their own merits and separate decisions would be issued. This decision relates to the appeal by the University of Winnipeg Retirement Association.

On January 8, 2007, Wesley Stevens, on behalf of the University of Winnipeg Retirement Association, requested an extension to file an appeal of the Order. That request was considered and he was given an extension until January 30, 2007, at which time an appeal was filed.

The appeal hearing commenced on February 14, 2007, and continued on April 4, 2007, to consider procedural and any preliminary issues raised by the parties. We have considered those matters and released our Interim Decision dated April 26, 2007 (attached as Appendix A).

Hearing dates were scheduled for September 13, 14 & 17, 2007, to consider the merits of the case. Mr. Stefanson, acting on behalf of the University of Winnipeg Retirement Association, indicated that Dr. Stevens would not be available on September 14 & 17 due to personal circumstances, and that he had a preliminary issue to deal with before he would provide the information requested in the Interim Decision. The panel met to consider his request on August 21st and then reconvened the hearing on September 13th to consider his issues. The panel considered those matters and released its second Interim Decision dated September 19, 2007 (attached as Appendix B). The hearing then was scheduled to proceed on the merits of the case.

Mr. Stefanson only represented the Retirement Association for the matters relating to his preliminary issues on September 13, 2007. When the case resumed, Dr. Stevens represented the Retirement Association.

BACKGROUND

On November 8, 2002, Mr. Frederick Barth and Dr. Wesley Stevens wrote to Robert Ziegler, Chair of the Pension Commission of Manitoba, requesting that the University of Winnipeg be removed as the plan administrator and trustee of the pension plan and that a new trustee be appointed to administer the plan. On November 8, 2002, Mr. Brent Stearns, Secretary of the University of Winnipeg Retirement Association, wrote to Mr. Ziegler expressing an interest in these matters.

Both letters were forwarded to Debbie Lyon, Superintendent of Pensions, who wrote on December 10, 2002, indicating that it was the Superintendent and not the Pension Commission that has the authority to appoint an administrator. Between December 20, 2002 and November 2006 the Superintendent did an investigation into the issues raised by the University of Winnipeg Retirement Association as well as issues that arose as a result of its investigation in regard to the complaint by the Retirement Association.

ORDER OF THE SUPERINTENDENT

On November 17, 2006, the Superintendent issued an Order containing six points. The Order states:

"I am of the view that based on the facts provided to me it is inappropriate to make an order to appoint a person to act in place of and to perform the duties of the University of Winnipeg as Administrator of The University of Winnipeg Pension Plan. However based on these facts, I hereby make an order that the University of Winnipeg:

- (a) develop and implement a written governance framework for The University of Winnipeg Pension Plan within 120 days of the date of this order;*
- (b) confirm to the Superintendent in writing within 30 days of the date of this order that it will develop and implement the written governance framework required by clause (a);*
- (c) provide to the Superintendent a copy of the written governance framework required by clause (a) within 30 days of its implementation;*
- (d) provide to the continuing DB plan members within 120 days of the date of this order benefits equal to a proportionate share of the surplus determined under paragraph 1.g. of the joint recommendation, adjusted with interest to the date of payment as required by the Act and Regulations;*
- (e) pay by a lump sum to the UW Pension Fund the cost of the benefits under clause (d) within 120 days of the date of this order; and*
- (f) arrange to have the December 31, 2004 actuarial valuation report amended to reflect clauses (d) and (e) and to file the amended report with the Pension Commission of Manitoba within 120 days of the date of this order."*

The University of Winnipeg Retirement Association appeal was dated January 28, 2007. The relief requested by the Association is as follows:

- “7. The Plan Members request an order overturning the conclusion stated in the Superintendent’s Order that ‘it is inappropriate to make an order to appoint a person to act in place of and to perform the duties of the University of Winnipeg as Administrator of the University of Winnipeg Pension Plan,’ an Order which disregards two contracts, written and signed by the University with Plan Members on 4 December 2000 and 23 September 2004, made at the initiation and by the requirement of the University, as legally binding instruments, and confirmed by the University Board of Regents on 11 April 2005.*
- 8. The Plan Members request an order requiring that the University of Winnipeg Pension Trust Fund be placed in the authority and control of an independent Trustee forthwith, together with an order for payment of penalties for the University’s unreasonable delay of six years, as of the Commission may consider appropriate.”*

NATURE OF THE APPEAL

It should be noted that the Superintendent did have concerns about the manner in which the University of Winnipeg was administering the pension plan, but did not find that the conduct went to the point that justified the removal of the University as administrator and appointment of a replacement. On page 13 of the Order, she states:

“However, while the University did not breach the legislation in relation to the contribution holiday, it is clear that the University is not exercising the care, diligence and skill prescribed by the Act in relation to certain aspects of the UW Plan’s governance, structure and processes.”

The issue in the matter before us is, did the conduct of the University justify the removal of it as the administrator of the plan. The relevant sections of the PBA are 8(3) and 8(2). The University of Winnipeg Retirement Association request is made under 8(3)(c) which reads:

8(3)(c) appoint a person to act in place of and to perform the duties of the insurer, administrator or trustee of a pension plan;

Section 8(2) gives guidance but no clear criteria under which a plan administrator should be removed. The relevant sections of 8(2) read as follows:

8(2) The superintendent may make an order in accordance with subsection (3)

(b) where, in the opinion of the superintendent, a pension plan or the manner in which it is being administered is not in conformity with this Act or the regulations;

(c) where, in the opinion of the superintendent, an employer or the insurer, administrator or trustee of a pension plan or any other person has committed a breach of a provision of this Act or the regulations;

In addition, guidance is given under section 28.1(2) and 28.1(5):

28.1(2) The administrator of a pension plan shall exercise the care, diligence and skill in the administration of the plan and in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

28.1(5) An administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the plan and the pension fund.

After reviewing the documentation in the original superintendent's file, as well as the documentation in evidence of witnesses during the hearing, the Commission agrees that there is concern with the manner in which the University of Winnipeg was administering the pension plan. Some of the significant areas include:

1. The Canadian Association of Pension Supervisory Authorities (CAPSA) issued guidelines on pension governance. Those guidelines were sent to plans throughout the province in January 2005 and plan administrators were expected to voluntarily take measures necessary to follow the guidelines (item 2 under Governance in the Superintendent's original file, Exhibit 2). It should be noted that the University of Winnipeg plan covers almost 600 individuals including active members, inactives and pensioners, and had assets in excess of \$100 million at December 31, 2001. From a review of the documentation and evidence of John Corp, it

appears that the University does not have any written governance guidelines which for a plan of this size is concerning.

2. In the original Order of the Superintendent, addressed on page 13 of the Reasons for Decision, she found that:

“the University as administrator does not have clear knowledge of its duties. There appears to be some role confusion created by the two “hats” worn by the University – as employer and as administrator – which can create the potential for miscommunication and differing expectations in respect of the Plan and its governance as between the University and members. It is noteworthy that at times some of the members of the Board of Regents (the “Board”) themselves felt that they are, at times, in a conflict and uncertain of their roles.”

Addressed on page 13 of the Reasons for Decision which reads as follows:

“At the June 24, 2002 Board meeting an exchange took place where one Board member said ‘...that the Board has competing legal obligations (its obligation to the Pension Plan and its members and its obligation to the University). The Board needs to have the power to decide which competing obligation to carry out. This gives away a power we cannot give away.’ While another member said that “...the Board’s primary concern is the long-term viability of the University.”

3. Further, notwithstanding that the Pension Committee was to communicate appropriate information about the plan to all members of the plan, the members of the plan received communication from Graham Lane (Exhibit 13 tab M), Dr. Frank Hector (Exhibit 13 tab C), Dr. Constance Rook (Exhibit 13 tab N) who did not appear to be writing or communicating on behalf of the Pension Committee.
4. As well, while the Pension Committee was responsible for the preparation of annual audited statements and to ensure that the actuarial valuations of the plan are made at least tri-annually, it appears that the Pension Committee did not oversee the preparation of the December 31, 2001 actuarial valuation (see Exhibit 2, tab 5). In fact when questioned by the Chair about his role as the independent actuary to the pension plan, the transcript on page 285, line 14 of the November 29, 2007 hearing reads as follows:

Q. In some of the documents, and I think under your own testimony (sic), you’re referred to as an independent actuary working on behalf of the Pension Committee. Is that correct or who did you view your client as? Your boss?

- A. It was not a clear situation, okay. One that one wasn't always particularly comfortable with.

Without limiting all the items considered these are some of the examples that the panel took into consideration when considering whether to uphold the Superintendent's decision to order items (a), (b) & (c) of her Order.

It is interesting to note that the University of Winnipeg did not address governance in its original written argument. In its reply brief there is only one paragraph on the matter. The substantive point of that paragraph being,

"...The University is close to transferring administration of the plan to the new trustee board. Rather than the University being ordered to now develop a written governance framework, that part of the Superintendent's Order should be deferred until the transition of the plan to the trustees is completed...."

While the panel accepts the parties' representation that a joint board of trustees is imminent, it has been claimed numerous times since 2001. Further, it is very possible that many of the individuals who have been dealing with the pension plan for the past number of years will be trustees on the new board.

As mentioned in the Superintendent's order, it was determined that there was concern about the manner in which the Plan was being administered. The question then becomes, at what point does it justify the removal of the University as administrator. The one case cited by the parties that is of most assistance is the case of **Bathgate et al. v. National Hockey League Pension Society et al [1994] O.J. No.265**:

*"The applicants have asked for the removal of the trustee. **Such an order is typically reserved for acts of dishonesty or where a court cannot be confident its directions will be followed.** I do not feel the respondents require this harsh remedial response. See D. M. Water, *Law of Trusts in Canada*, 2nd ed. (1984), pp. 682-87.*

The cross-appellants take the position that an act of misconduct or dishonesty is not required in order to require intervention by the court to replace a trustee. They submit that such intervention is required where the continued administration of the trust with due regard for the interest of the beneficiaries has become impossible or improbable.

They have complained of the series of decisions made by the trustee with respect to the allocation and use of surplus funds arising from the experience rate credits which adversely affected the interests of the cross-appellants.

We are satisfied that the positions taken by the cross-appellants are in accordance with the applicable principles of law. The reasons given by Adams J in refusing to replace the trustee do not, however, indicate that he was unaware of these principles or failed to apply them in exercising his discretion. His exhaustive reasons for judgment indicate his full appreciation of all of the facts and the decisions of the trustee referred to by the cross-appellants. ...

The cross-appellants rely on Letterstedt v. Broers (1884), 9 App. Cas. 371 at pp. 385-86, [19881-85\ All E. R. Rep. 882 (P.C.), where Lord Blackburn quoted with approval the following passage from Story's Equity Jurisprudence, s. 1289:

But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts of omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

We are of the opinion that Adams J was correct in not making any finding of dishonesty, or misconduct, or lack of reasonable fidelity on the part of the trustee in carrying out its duties. Neither has any of its acts or omissions endangered the trust property in this case having regard to the parties involved. We are also of the opinion that there is no reason to believe that the trustee will not fully implement any judgment of the court.”

The Panel has determined that the factors it would consider in removing the University of Winnipeg as the plan administrator include dishonesty and/or misconduct, including but not limited to, any refusal to cooperate or comply with the Pension Commission /Superintendent in the performance of their duties, or any indication that they would refuse to comply with any order under the PBA.

In their written argument the Retirement Association claims that

10. Each of those submissions included undisputed evidence of dishonesty, misconduct, and lack of reasonable fidelity on the part of the University in its role as Administrator of the Pension Plan and as Trustee of the Pension Trust; to wit:

Recovery of funds by the Trustee, specifically forbidden to the Trustee, is an act of dishonesty;

Misrepresenting the law by the Administrator of a Trust is an act of misconduct;

Failure of Fiduciary Duty by the Trustee, as discovered and stated by the Superintendent, is a lack of reasonable fidelity.

Most if not all of the items referenced in the written argument are issues that were raised to the Superintendent during the investigation period from November 2002 until November 2006. The Superintendent commented on most of these items in her Reasons for Decision. For example, many of the points relate to the University's right to take a contribution holiday. The Superintendent ruled that the University's right to take a contribution holiday was supported by the provisions of the University of Winnipeg plan and was not in breach of the Act.

As the appeal filed relates only to governance and not whether the Superintendent was correct in ruling on the contribution holiday etc., it was not argued by the parties or considered by the panel. For the panel to have come to the conclusion that the University of Winnipeg had demonstrated dishonesty, misconduct or a lack of reasonable fidelity, the University of Winnipeg Retirement Association would have had to have shown that the Superintendent had erred in her previous rulings.

DECISION

After considering all the documentation and evidence presented, it is the view of the panel that the applicant has not shown grounds to require the removal of the University of Winnipeg as the administrator and trustee of the pension plan. It should be stated that the actions stated in the Superintendent's Order could easily be considered the first steps in the removal of the University as administrator should they fail to correct the areas of concern.

The panel does concur with the original decision of the Superintendent that a written governance framework should be developed, but that in light of the time since the issuing of the order and the transition to a new Board of Trustees which may be finalized shortly, rules as follows:

The portion of the Superintendent's Order relating to the requirement to:

- (a) develop and implement a written governance framework for the University of Winnipeg Pension and;
- (b) confirm to the Superintendent in writing that it will develop and implement the written governance framework required by clause (a);
- (c) that the Superintendent be provided a copy of the written governance framework be maintained.

are appropriate and are upheld.

In regard to who is the proper party to comply with these requests, the panel directs the Superintendent to amend the Order to reflect that it is the University of Winnipeg and/or the successor administrator, possibly a new joint Board of Trustees, who would be required to comply with these items.

In respect of the timing of items (a) to (c), we direct the Superintendent to use her discretion to address the timelines accordingly.

The panel reserves jurisdiction should there be any issues relating to the above noted items.

While the Panel has not commented on the submissions made by the affected parties, namely, the University of Winnipeg Faculty Association, the Association for Employees Supporting Education, and the University of Winnipeg their submissions were considered and did assist the Panel in reaching a conclusion.

Although not all material supplied and submissions made by the parties have been referred to in this final decision, they were considered. The panel would like to acknowledge the parties' cooperation in this process.

This Final Decision is made in the City of Winnipeg this 23rd day of April, 2008.

Robert Ziegler,
Chairperson
On behalf of the Manitoba Pension Commission