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June 15, 2009

The Honorable Lisa Baker
Senate of Pennsylvania
172 Main Capitol Building
Harrisburg, Pennsylvania 17120

The Honorable John Yudichak
House of Representatives
324 Main Capitol Building
Harrisburg, Pennsylvania 17120

Dear Senator Baker and Representative Yudichak:

I am writing to update you on developments since my letter of April 9 regarding the retirement application of former judge Mark A. Ciavarella, and to advise you of related developments regarding retired judge Michael T. Conahan.

In my previous correspondence, I explained that a thorough review was then under way to examine the facts of the Ciavarella case and how it should be handled under the Pension Forfeiture Act (Act 140). The same was true of the Conahan case.

In addition to review by SERS' staff and counsel, we also conferred with the Office of General Counsel (OGC) and, at OGC's recommendation, sought the advice of outside counsel.

We have now received the advice of outside counsel and, based on that advice, have concluded that both Mr. Ciavarella and Mr. Conahan forfeited their pensions under Act 140 upon the entry of their respective guilty pleas on February 12 of this year. Both have been formally notified of this determination.

As a consequence, Mr. Ciavarella will not be receiving monthly pension benefits from SERS, nor will he be receiving the interest earned on his contributions. In addition, we are withholding the refund of his contributions, for reasons explained below. Mr. Conahan, who retired prior to the filing of charges and who has been receiving a monthly benefit, will no longer receive that monthly benefit. His April payment was his last. Additionally, SERS will seek to recover the amounts paid to him since the entry of his guilty plea. (No monies have been paid to Mr. Ciavarella, so there is no need to seek recovery in his case.)

The legal determination that forfeiture occurred in these cases upon entry of the guilty pleas does represent a departure from past practice for SERS. Previously this agency has not distinguished between guilty pleas and trial verdicts, holding that in either event the forfeiture did not occur until "conviction," which as a matter of law occurs at sentencing. Outside counsel has advised, however, that pleas of guilty or no contest should be treated differently than trial verdicts, noting that the statute itself states forfeiture shall occur when defendants are "convicted of *or* plead guilty"

Our past practice was not without legal support and did allow SERS to apply the same standard – conviction – to all cases, but we are now persuaded that forfeiture when the plea is entered represents the better reading of the law. It is, therefore, the interpretation SERS will henceforth follow.

Senator Baker and Representative Yudichak
June 15, 2009
Page 2

Having determined that forfeiture properly occurs upon entry of a plea of guilty or no contest to a forfeiture offense, outside counsel next undertook to research whether the crimes to which these two defendants pleaded guilty constituted forfeiture offenses under Act 140, and also whether their pleas (which remain subject to withdrawal) constituted a legally sufficient admission of guilt for forfeiture purposes. This entailed a detailed study of not only the plea agreement documents themselves but also the charging documents and the transcript of the plea hearing. The conclusion was affirmative that both defendants had in fact fully admitted their guilt with regard to violations of federal law “substantially the same as” Act 140 enumerated state-law crimes, and that said crimes were related to the defendants’ public employment.

There is also a related development of which you may already be aware: The Department of Public Welfare late last month filed claims against the pension benefits of both Mr. Ciavarella and Mr. Conahan, asserting that the Commonwealth is owed \$4,334,921, jointly and severally, as a result of their admitted criminal actions. In Mr. Ciavarella’s case, the filing of this claim means that even if he ultimately is determined to be eligible to receive any payments of his contributions under Act 140, he will not receive the refund of his own contributions, pending resolution of the claim. If the DPW claim is determined to be in order, Mr. Ciavarella’s contributions would be available to help satisfy the claim. Mr. Conahan had already received his contributions, so there is not a lump sum payment from the pension fund that could be used to satisfy the DPW claim. If, however, it were to be subsequently determined that the Act 140 forfeiture was found not applicable to Mr. Conahan, the Commonwealth debt claim could attach to his monthly payments.

As required by law, Mr. Ciavarella and Mr. Conahan have appeal rights that could result in a court ruling different from what SERS has concluded.

If you have any further questions regarding this or any other SERS-related matter, please let me know.

Sincerely,



Nicholas J. Maiale
Chairman