

**PUBLIC EMPLOYEE
RETIREMENT COMMISSION**

ADVISORY NOTE

Date Prepared:	November 18, 2003
Agency Contact:	A. W. Salomone
Telephone:	783-6100

House Bill Number 1338, Printer's Number 1644

Prime Sponsor: Representative Steven R. Nickol

Committee: House Local Government Committee

Retirement Systems Affected: Pennsylvania Municipal Retirement System (PMRS)

Subject: Establishment of Statewide Defined Contribution Plan for Tax Collectors

SYNOPSIS

House Bill Number 1338, Printer's Number 1644, would amend Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes by permitting the establishment of a statewide, tax qualified, defined contribution retirement plan for tax collectors in the Commonwealth. The Pennsylvania Municipal Retirement System (PMRS) would serve as administrator of the plan.

DISCUSSION

In Pennsylvania, the local tax collector is the municipal officer designated to collect municipal and school real estate and personal taxes levied under the municipal codes, and in most cases, county real estate and personal taxes. In most jurisdictions, tax collectors are elected officials and serve four-year terms of office. Some home rule charters provide for an elected tax collector or treasurer, while others have appointed tax-collecting officers.

There are only minimal qualifications for candidates to hold the office of tax collector. In third class cities, the city treasurer must be a competent accountant, at least 21 years of age, and a resident of the city for a year before the election. Status as a public accountant or certified public accountant is not necessary. In first class townships, the only qualification is that a candidate be a registered voter of the municipality. In boroughs and second class townships, the tax collector must have resided in the municipality for one year before the election and continue to reside there during the term of office.

Act 25 of 2001 established a program that encourages tax collectors to attend training and complete testing to become "qualified" tax collectors. This voluntary program is intended to increase the

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knowledge and professionalism of tax collectors. A participating individual must complete the basic training program before taking an exam. Individuals that successfully pass the exam receive a certificate stating that they are a qualified tax collector, and the certificate is valid for one year. The Department of Community and Economic Development (DCED) administers this program and maintains a registry of qualified tax collectors. In 2003, there were 493 tax collectors qualified under this program. Each qualified tax collector must attend ten hours of continuing education each year to maintain their status as a qualified tax collector. Any tax collector who has served eight or more terms is exempted from this program.

Municipal tax collectors collect school taxes levied under the authority of the Public School Code, including school real estate taxes. There is no authority for a school district to collect these taxes through its own employees; this function has been assigned to the municipal tax collectors. The Local Tax Enabling Act (Act 511 of 1965) authorizes municipalities and school districts to provide their own arrangements for collecting taxes levied under the Act. School districts and municipalities with powers to levy taxes under the Local Tax Enabling Act have discretion to appoint the elected tax collector to collect some or all Act 511 taxes.

In most local units, the elected tax collector is not designated collector for all Act 511 taxes. Act 511 per capita and occupation taxes are most often collected by the elected tax collector since these are billed and collected once a year, usually with the jurisdiction's real estate and code per capita and occupation taxes. Earned income taxes are usually collected by specialized bureaus or private collection agencies. Mercantile, business privilege and amusement taxes are often collected by municipal licensing agencies.

The method of compensation for tax collectors varies according to the type of jurisdiction, and may be on either a salaried or commission basis. Third class city treasurers receive a salary and cannot be paid on a commission basis. In boroughs and townships, the tax collector may be compensated on a salary, commission or mixed basis. When a school district covers more than one municipality, the school board can set a separate commission rate based on the difficulty of collecting taxes in each municipality. The courts have also upheld sliding scale compensation schedules, based on the extent various collection responsibilities are voluntarily delegated to the school district or to a deputized bank.

The Federal Omnibus Budget Reconciliation Act of 1990 brought certain classes of public officials, including elected tax collectors, under Social Security and Medicare coverage. In 1991, the Social Security Administration adopted the Internal Revenue Service's definition of wages to include commissions paid to tax collectors. All tax collectors' compensation is now subject to withholding for Social Security and Medicare and the taxing districts are responsible for the employers share of these taxes. Elected tax collectors are no longer considered self-employed for Social Security purposes.

DISCUSSION

The salaries of city treasurers and assistants as tax collectors are considered compensation for the purpose of city retirement plans. The taxing bodies share in the employers contribution to the pension fund on a pro rata basis. In boroughs and townships, tax collectors are not eligible for municipal retirement plans, since they are independent elected officers. However, if the municipality has joined the Pennsylvania Municipal Retirement System (PMRS), it can determine whether membership for elected officers is optional, required or prohibited.

Some tax collectors may also be eligible to participate in the Public School Employees' Retirement System (PSERS), if they meet certain employment-related criteria. The Public School Employees' Retirement Code defines a school employee as any person engaged in work relating to a public school who receives regular remuneration as an officer, administrator or employee, excluding independent contractors or persons compensated on a fee basis (*Title 24, Public School Employees' Retirement Code, Section 8102*). The test used to determine whether an individual is an independent contractor or an employee includes the following factors: 1) who controls the manner of work; 2) who is responsible for the result; 3) who supplies the tools of employment; 4) whether payment is made based on time or by job; 5) whether work is part of the employer's regular business; and 6) whether the employer possesses the right to terminate employment at any time (*Grogan v. Pennsylvania Public School Employees' Retirement Board, 711 A.2d 558, Pa. Cmwlth, 1998*).

Generally, for the small number of tax collectors who do meet the definition of "school employee," evidence was presented establishing that the tax collector worked under the supervision and control of a school employer that contributed to the tax collector's employee benefits and work supplies. However, in most cases, the Commonwealth Court has held that the tax collector was an independent contractor because he hired, paid, and supervised his own employees, did not receive employee benefits, controlled his own schedule and was not subject to traditional at-will termination (*Crimmins v. Commonwealth Public School Employees' Retirement Board, 685 A.2d 232, Pa Cmwlth, 1996*). In the vast majority of cases, tax collectors do not meet the definition of school employee under the PSERS Code and are, therefore, ineligible for membership in PSERS.

The bill would amend Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes to permit the Pennsylvania Municipal Retirement System Board to establish the Pennsylvania Tax Collectors Retirement Plan, a statewide, tax qualified, defined contribution pension plan established pursuant to IRC Section 401 for tax collectors in the Commonwealth. Participation in the plan would be mandatory for all "tax collectors" as that term is defined in the bill, except for: 1) an individual who receives less than \$12,500 in compensation as an elected tax collector; 2) an individual who is employed by a tax collector or any entity other than a municipality or school district for the collection of taxes; and 3) an individual who, based on compensation earned as a tax collector, has retirement coverage in a retirement plan that is established or maintained by a municipality or school district for its employees.

DISCUSSION

Under the bill, plan participants would be required to contribute 7.5% of compensation as a tax collector through mandatory payroll deductions which the taxing jurisdiction (municipality or school district) would then contribute to the plan on behalf of the plan participant. The provision will be problematic in that most local tax collectors are not compensated through a payroll. In these instances, the local tax collectors are directly compensated on an intermittent basis through commissions that are determined when the actual tax payments are received. Accordingly, the municipality or school district would be unable to deduct the required contributions and transfer them to the plan in a systematic manner. Also under the bill, the contributions would be made tax deferred and would be picked up by the taxing jurisdiction in accordance with IRC Section 414(h). The "employer pick up" provision under IRC Section 414(h) provides for mandatory employee contributions to an employer-sponsored pension plan to be treated as employer contributions, which in effect excludes the "picked up" contributions from the employee compensation that is taxable for federal income tax purposes. There may be some legal question concerning the propriety of this provision since neither the local entity (municipality or school district) nor the Commonwealth is the employer-sponsor of the plan with responsibility for issuing the W-2 wage statement that reflects the reduction in the employee's taxable compensation.

Section 6752 of the bill provides for the mandatory contributions to the plan by tax collectors to be exempt from both State and local income taxes. This exemption is not granted to any other public employees (State government, local government, and public school employees) in the Commonwealth, even though they also make mandatory contributions to their pension plans. The reason for the proposed preferential treatment of local tax collectors is not apparent. (As drafted in Section 6752, the contributions to be exempted are "contributed by the municipality or school district" rather than being contributed by the tax collector as specified in Section 6502.)

SUMMARY OF ACTUARIAL COST IMPACT

The Commission staff has reviewed the bill and determined that, due to the nature of the defined contribution plan described in the bill, the bill will have no actuarial cost impact beyond the mandatory employee contributions equal to 7.5 percent of payroll. However, there would be undetermined administrative costs incurred by the Pennsylvania Municipal Retirement System associated with the establishment and administration of the plan.

POLICY CONSIDERATIONS

In reviewing the bill, the Commission staff identified the following policy considerations:

Plan Administration. Due to its significant experience in managing defined contribution retirement plans for its members and in administering individual retirement plans for municipal governments, PMRS is an appropriate agency to administer a statewide retirement plan for elected tax collectors. However, there may be administrative problems in communications and monetary transfers due to the widespread absence of an actual government employer with respect to local tax collectors.

Appropriateness of Retirement Plan for Tax Collectors. The General Assembly must consider the appropriateness of establishing a state government-administered retirement plan for elected tax collectors, who, in most cases, operate as self-employed, independent contractors and are not subject to oversight, reporting, discipline or other measures normally associated with governmental employment.

Private Sector Alternatives Available. Because they usually operate as self-employed, independent contractors, most tax collectors already have access to the same private sector retirement plan alternatives available to any other self-employed individual.

Potential Financial Hardship. The requirement to contribute 7.5% of compensation to a defined contribution pension plan may be viewed as an unwelcome financial hardship by some local tax collectors who have varying needs for a retirement program.

Administrative Costs. PMRS will incur additional administrative cost associated with the establishment and operation of the defined contribution plan provided for in the bill, and there is no clear mechanism in the bill to provide for the recoupment of these costs.

Inconsistency in Income Tax Exemption. The proposed exemption of the contributions made to the tax collector pension plan from both State and local income taxes is not consistent with the tax treatment of the contributions made to all other public employee pension plans in the Commonwealth.

Conformity with IRS Provisions. Unless the Commonwealth is to become the employer of local tax collectors, the proposed "pick up" of the employee contributions under IRC Section 414(h) may warrant review by legal staffs of the General Assembly to ascertain its administrative feasibility and conformity with the IRC.

ATTACHMENT

House Bill Number 1338, Printer's Number 1644