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April 20, 2010

VIA E-MAIL and U.S. MAIL

Honorable Bruce Johnson
Administrative Law Judge
MN Office of Administrative Hearings
P. O. Box 64620
St. Paul, MN 55164-0620

RE: In the Matter of the PERA Salary Determinations Affecting Retired and
Active Employees of the City of Duluth
OAH Docket No. 4-3600-2080902

Dear Judge Johnson:

This letter is the submission on behalf of Petitioners Paul Ostman, Doug Michog, John Edwards, Mark Behning, Terry Purcell, Doug Belanger, Dave Salvesson, Anne Peterson, L. J. Harvey, William L. Johnson, and Dave Wedin.

You indicated at the conclusion of the hearing on April 13, 2010, that parties could submit by close of business on Tuesday, April 20, any support for a technical definition of the terms *employer paid fringe benefits*, *flexible spending accounts*, and *cafeteria plans*, which terms are utilized in Minnesota Statute §353.01.

- I. *Black's Law Dictionary Definitions.* *Black's Law Dictionary* includes definitions for *fringe benefit* and *cafeteria plan*.

fringe benefit. A benefit (other than direct salary or compensation) received by an employee from an employer, such as insurance, a company car, or a tuition allowance. – Often shortened (esp. in pl.) to *benefit*. (See attached Exhibit A)

cafeteria plan. A employee fringe-benefit plan allowing a choice of basic benefits up to a certain dollar amount. (See attached Exhibit B)

There is no *Black's Law Dictionary* definition for *flexible spending accounts*.

- II. *Minnesota Statutes.* There are references to the terms included in Minnesota Statutes as follows:

Fringe benefits. The term *fringe benefit* is utilized in the following statutes:

MSA § 13.43 “The value and nature of *employer paid fringe benefits*.” Chapter 13 Appendix Rules of Public Access to Records of the Judicial Branch Rule 5: “The value and nature of *employer-paid fringe benefits*.”

MSA § 179A.03, “‘Terms and conditions of employment’ means the hours of employment, the compensation therefor including *fringe benefits* except retirement contributions or benefits other than employer payment of, or contributions, premiums for group insurance coverage of retired employees or severance pay”

MSA § 256B.421, “*Fringe benefits* means workers’ compensation insurance, group health or dental insurance, group life insurance, retirement benefits or plans, except for public employee” (medical assistance for needy persons nursing facility rates).

MSA § 383A.285, “To set hours of employment, sick leave, vacation leave, leave of absence without pay, health insurance, life insurance, and other *fringe benefits* for employees” (Ramsey County conditions of employment).

MSA § 383D.23, “shall be subject to an open application and screening process. An employee in the unclassified services is entitled to all *fringe and compensation benefits* afforded to similarly situated employees in the classified service such as, but not limited to, vacation leaves, holiday leave, health” (Dakota County positions).

MSA § 412.111, “The police civil service commission of a village could not establish pay scales, vacations, sick leaves, hospitalization, insurance and *other fringe benefits*, but it would be within the implied authority of the village council, who had the authority to fix compensation, to provide such fringe benefits.” (Statutory Cities Officers, Employees; Op.Atty.Gen., 785e-2, October 21, 1965.)

(See Exhibit C, Westlaw search of *fringe benefits* in Minnesota Statutes.)

Flexible benefit. The term *flexible benefit* is included in the following statutes:

MSA § 252.27, “The amount reimbursed may be taxable income if the parent paid for the parent’s fees through an employer’s *health care flexible spending account* under the Internal Revenue Code, section 125” (Services for persons with developmental disabilities.)

MSA § 518A.29, “Employer-sponsored benefit plan that allows an employee to pay for a benefit or expense using pre-tax dollars, such as flexible spending plans and health savings *accounts*.” (Child support computation.)

(See Westlaw search Exhibit D)

Cafeteria plan. The term *cafeteria plan* is utilized in the following statutes:

MSA § 62U.07, “‘Section 125 plan’ means a *cafeteria or premium-only plan* under section 125 of the Internal Revenue Code that allows employees to pay for health coverage premiums with pre-tax dollars.” (Quality of health care services – tax credit.)

MSA § 268.035, “Any payment made under any type of salary reduction agreement, including payments made under a *cash or deferred arrangement and cafeteria plan*, as defined in United States Code, title 26, sections 401(k) and 125 of the federal Internal Revenue Code.” (Employment and economic development.)

(See Exhibit E).

III. Analysis.

It is clear from the history of the Duluth deferred compensation benefit at issue here that it was additional compensation to employees of the City of Duluth in their collective bargaining agreements. The *Black’s Law Dictionary* definition of *fringe benefit* specifically excludes “direct salary or compensation.” Therefore, the deferred compensation plan as implemented by the City is not a fringe benefit. Likewise, the City never paid for family coverage, and therefore the family health benefit was never a “fringe benefit” provided by the City. The definition of “terms and conditions of employment” in the Public Employment Labor Relations Act (MSA § 179A.03) makes clear that fringe benefits do not include retirement contributions and therefore makes clear that the fringe benefits are not part of retirement contributions. The deferred compensation plan was clearly a retirement contribution.

A *flexible spending account* is referenced in the statutes as a “health care flexible spending account” under the Internal Revenue Code and as a plan that allows an employee to pay for a “benefit or expense using pre-tax dollars such as flexible spending plans and health savings accounts” in the child support law. The Internal Revenue Code, section 125, governs the terms of said plans, and the deferred compensation plan at issue here was never a flexible spending account or plan under the Internal Revenue Code. None of the documentation submitted in this case suggests that it was, or that it was intended for that purpose.

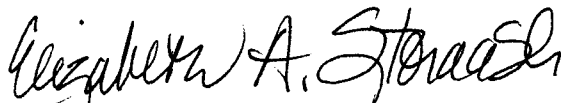
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With regard to *cafeteria plan*, the *Black's Law Dictionary* definition makes clear that a cafeteria plan is a subset of a fringe benefit plan. The choices available in the cafeteria must all be fringe benefits. The definition of section 125 plan in MSA § 62U.07 makes clear that it is limited to a plan that allows "employees to pay for health coverage premiums." The deferred compensation plan was not a section 125 plan under the Internal Revenue Code since it was in fact a deferred compensation plan which is not a "fringe benefit" but rather "direct salary or compensation" under the *Black's Law Dictionary* which excludes it from fringe benefits.

Accordingly, the deferred compensation plan operated by the City of Duluth is not excluded as a fringe benefit, a flexible spending account, or a cafeteria plan under the meaning of *Black's Law Dictionary* and the Minnesota Statutes, and therefore is not excluded from salary under MSA § 353.01.

Yours truly,

DRYER STORAASLI KNUTSON
& POMMERVILLE, LTD.



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EAS/jn

cc: Jon K. Murphy
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