

**NEW CASTLE COUNTY EMPLOYEES' PENSION PROGRAM**  
**Minutes of July 16, 2014**

The regular meeting of the Board of Trustees was held on July 16, 2014 in the Government Center (Manager's Conference Room), 87 Reads Way, New Castle, DE 19720.

<p align="center"><b><u>BOARD MEMBERS PRESENT:</u></b></p> <p>Christine Dunning, CHRO          Daniel McFadden, Chairperson          Douglas Merrill, FOP Lodge #5          Kenneth Porter, Trustee          Michael Coupe, CFO          Paul Frese, Trustee Non-Union Members          Regis Yurcich, Trustee, Local #1607          Rich Piekarski, Jr., Trustee, Local #3109          Robert Barczak, Trustee, Local #459          Saul Polish, Trustee, Local #3911          Terry Stone, Trustee</p>	<p align="center"><b><u>BOARD MEMBERS ABSENT:</u></b></p> <p>Michael Finnigan, Trustee, Retirees</p>
<p align="center"><b><u>OTHERS PRESENT:</u></b></p> <p>George Smiley, County Council          Christine Piekarski, NCC/Finance          Lynne McIntosh, NCC Audit Dept.          Nicole Racine, Local 3109          Ed Milowicki, NCC/Finance</p>	<p align="center"><b><u>STAFF PRESENT:</u></b></p> <p>Tammi Martin, Pension and Benefits Administrator          Marlane White, Asst. County Attorney II          Rowena P. Liles, Pension Board Secretary</p>
<p align="center"><b><u>INVITED GUESTS:</u></b></p> <p align="center">Kevin Leonard, NEPC          Greg Hymowitz, Entrust Capital Management          Ellie McNamara, Entrust Capital Management</p>	

The meeting was called to order at 8:09 a.m.

**8:09 a.m. MINUTES**

The minutes from the June 18, 2014 meeting are attached for approval.

**Doug Merrill made a motion to approve the minutes from the June 18, 2014 meeting.**

\*The motion was seconded by Paul Frese and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:09 a.m. INVOICES APPROVED**

Boomershine Consulting Group	\$5,110.00	May, 2014
State Street Corp.	\$14,761.11	April, 2014
State Street Corp.	\$12,456.62	May, 2014

**Saul Polish made a motion to approve the invoice payments.**

\*The motion was seconded by Ken Porter and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

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**8:10 a.m. COORDINATOR'S REPORT by Tammi Martin**

- ❖ Capital Call – Northstar and Crescent - *We received two capital calls for Northstar one was on June 30, 2014 for \$414,499.00. We received one due on July 20, 2014 for \$531,088.00 dollars and then one for Crescent on June 26, 2014 in the amount of \$398,007.00 dollars.*
- ❖ Pension Asset Trust Summary - *The books have not been closed through June, but when the books close Rowena will send that out electronically.*

*I did just have one additional item. I was going through things that needed to be cleaned up since this is my last Pension Board meeting with you guys. The one thing that had come to my attention about I think it was probably from the May meeting was the \$2.9 million dollar settlement from JP Morgan. There is a concern as to how that money was being utilized whether or not it was going back into the Trust. What could be done with it? What couldn't be done with it? It was my understanding that the County was using it to offset their contribution. I'm not sure what the legal opinion is on that, but I wanted to make sure that it didn't fall between the cracks. So I don't know if anybody has any questions on that, but it came to my attention so I just don't want to leave it unattended to.*

*Marlaine – That was the settlement we talked about where the Pension Trust received \$2.9 million dollars and the County received \$300,000 plus for its investments. The pension itself receives \$2.9 million for its losses. My understanding is the County is using it to offset their contributions. I mentioned that to the County Attorney that I didn't believe that was correct. He disagreed with me. I believe you have a problem because the Office of Law represents County, County Council and represents you. There is a difference of opinion and you have fiduciary duties which we will discuss. So per the NCC Code Section 26.04.602(B) "In order to fulfill its fiduciary duties, the Board may, at its sole discretion, by a three-fourths (3/4) vote of the entire Board, hire independent legal counsel with specific expertise to address specific areas of concern to the Board." I believe the Professional Rules of Conduct, but I don't have this memorized I thought a lot about this. If you clients with conflicting interest, which would be the case here, then you have to let the client know that they need to get independent counsel or different counsel and that is what we have here. The Office of Law serve as Chief Legal Advisor to the County Executive, County Council and all County departments, boards, offices and agencies, but remember you are a trust separate and distinct. Under NCC Code Section 02.05.505(a) says that "The pension program created under Article 4 of Chapter 26 of this Code shall be construed to be a trust separate and distinct from all other entities."*

*The Board held an in-depth discussion on the matter.*

**Doug Merrill made a motion to seek outside counsel to look into how the \$2.9 million dollar settlement was used by the County to offset their contribution.**

*\*The motion was seconded by Paul Frese and approved.*

*For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich*

*Against: (0)*

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**COORDINATOR'S REPORT (Cont'd)**

**Regis Yurcich made a motion to notify the County Executive and County Council with the Boards concern, as a result of their fiduciary responsibility, regarding the \$2.9 million dollar settlement used to offset the County contribution.**

\*The motion was seconded by Ken Porter and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:50 a.m. APPLICATIONS FOR BENEFITS APPROVED**

**Service Retirements**

James T. Thorpe	\$2,254.80	August 2, 2014
Anthony C. DiNardo	\$3,508.00	July 12, 2014
John H. Weber	\$2,438.79	September 20, 2014

**Saul Polish made a motion to approve the service benefits.**

\*The motion was seconded by Regis Yurcich and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:50 a.m. Survivor Benefits**

Betty Carpenter	\$980.54	June 5, 2014
Barbara Griffin	\$580.03	June 22, 2014

**Ken Porter made a motion to approve the survivor benefits.**

\*The motion was seconded by Rich Piekarski and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:50 a.m. Lump Sum Benefit**

Leon Gratkowski	\$1,050.83
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**Doug Merrill made a motion to approve the lump sum benefit.**

\*The motion was seconded by Terry Stone and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:51 a.m. Refund Benefits**

Balfour Gore	\$1,305.17	RetAMD
Stella Crennan	\$490.00	SCGPen
Robert Sullivan	\$24,029.08	RetGen
Valencia L. Beaty	\$12,929.86	RetAMD
Susan M. Githens	\$8,486.29	RetAMD
Tammi Martin	\$5,116.49	PlnAMD

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**Refund Benefits (Cont'd)**

**Doug Merrill made a motion to approve the lump sum benefits.**

\*The motion was seconded by Terry Stone and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**8:52 a.m. NEW BUSINESS**

- Requesting the Board's approval for Susan Lawler, Pension Program Analyst to attend the 60<sup>th</sup> U.S. Annual Employee Benefits Conference in Boston, MA from October 12, 2014 – October 15, 2014.

**Regis Yurcich made a motion to approve the lump sum benefits.**

\*The motion was seconded by Rich Piekarski discussed and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**9:02 a.m. OLD BUSINESS**

- In-depth Fiduciary Duty discussion – Marlane informed the Board on several points of Fiduciary Duty.
  - a. *Duty of Loyalty – The Chief Justice of the Supreme Court, Benjamin Cardozo in 1928 described that as, a trustee is held to something stricter than the morals of the marketplace not just honesty, but the punctilio of an honor that's most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. In plain English what that means is you, as a fiduciary, cannot harm the interests of system members and beneficiaries in any way. You can't do it by self-dealing, acting in the interest of a third-party which includes employer or plan sponsor. You can't favor one group of members or beneficiaries over another. You have a Duty of Impartiality. You can't favor members receiving disability payments over regular members. You have to treat them all equally.*
  - b. *Duty of Care – To act with care, skill, prudence, diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims. What that emphasizes is process over outcome. You have to be very careful in how you perform your duties, as trustees, for this pension trust. There is no one size fits all. Every situation that comes up that is unique you have to deal with. You are dealing with this one that came up this morning. You have to evaluate matters in terms of the actions of prudent fiduciaries for other systems facing similar circumstances. Seeking outside counsel with public pension expertise would be a good example of that. Duty of Care is independent of Good Faith. You can't have a good heart and an empty head. Oh well, I thought it was a good idea. I really meant well, but in reality you didn't evaluate. You didn't take the time to see if this is a good idea. Is it the right thing to do in the best interest of the members and the beneficiaries? When there is a breach of fiduciary duty a claim is against you, as trustees, the Board and you individually.*

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**OLD BUSINESS (Cont'd)**

*The County Indemnifies you as part of its code under Section 02.003.200 and Section 02.003.201(a) "the term "County officers and employees" shall include the County Executive and County Council, all appointed officers and all employees of the County. The term "County officers and employees" shall include all of the members of the Board of Trustees of the Employees' Retirement System of the County." The problem is even if you are indemnified, if you are found to have acted criminally or found guilty after trial or plead guilty there is a whole list of things then you will be repaying what was indemnified on your behalf. So basically what that means is you, at all times, have to act with the upmost honor, loyalty and care and dedication to the system the pension trust and its members and beneficiaries. When I looked at this presentation, if you turn the page, let me step back a second. Let me give you some more things for acting in the interest of the trust exclusively. This is from the Restatement Third of Trusts and what that is is American laws a guide for how all trust issues are dealt with. Courts look to that routinely in Delaware law, if there is a question, the Restatement of Trust says X. So consistent with the Uniform Trust Code, the courts hold that a trustee must administer the trust solely in the interest of the beneficiaries. Administering the trust solely in the interest of the beneficiaries has been described as the most fundamental duty owed by a trustee. A trustee should not act in his or her own interests, or the interest of a third person. In other words, a trustee has a duty to avoid conflict of interest. A fiduciary cannot contend that although he or she had conflicting interests he or she served both masters equally well. Or that her primary loyalty was not weakened by the pull of the secondary one. The rule of undivided loyalty is enforced with uncompromising rigidity. So your loyalty when you step in this door for this meeting and in your dealings with the pension trust is to this trust alone nothing else. If Councilman Smiley, since he's here today, says to Paul I would like you to do this. Sorry. Paul has to act in the best interest of the trust members and beneficiaries. This supplement that NAPPA provided talks about Impact of Undue Influence on Prudent Decision Making. They describe Undue Influence as the employment of any improper or wrongful pressure, scheme or threat by which one's will is overcome and he or she is induced to do or not to do an act which he or she would not do, or would do, if left to act freely. In other words you are doing something because you are pressured to do it that you otherwise wouldn't do; or you're saying hey I would like to do something because I believe it's in the best interest of the trust and the beneficiaries. This undue you say well I'm not going to do it. Apparently this has been enough of an issue in many Public Pensions that this was necessary to be part of NAPPA conference in 2012. They did some examples of wrongful pressure coercion, if the target could discuss his or her feelings, he would say I wouldn't do it but I must do it; or false affection the perpetrator portrays benevolence generating undeserved goodwill from the target and the target needs to say why is this person who wants something from me being so nice to me. There are different areas different examples. You could have pressure like you're going to lose your job, we're going to kick you out of your union or you could have someone saying we really like you to do this really playing on your heart strings because this group needs it more than the other one. There are all sorts of forms of undue influence that can create problems for you as fiduciaries to the trust particularly direct pressure; or threat like I said. Indirect pressure or threat, totality of the circumstances just because you're paranoid doesn't mean they're not out to get you is the example they use. Then there is also there is no undue influence you're just being paranoid. Sometimes you don't want to go overboard, but examples of direct pressure or threat would be (1) approve this transaction or lose your job, (2) if the Board votes to oppose this bill Legislature will whack system's budget, (3) if the Board doesn't do X, the appointing authority says I will appoint new Board members who will do what I want. So that's examples of direct pressures. Indirect Pressures (1) I just talked to so and so about the great new investment they're proposing to the system, which I understand you're reviewing and I look forward to seeing you tomorrow at your performance review, (2) the trustee with appointing power requires new trustee upon appointment to submit advance letter of resignation. These examples are taken from situations that have arisen across the country.*

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**OLD BUSINESS (Cont'd)**

*The Totality of the Circumstances example you know (1) the room is full of very important people someone says to you the newest Iron Chef winner just opened up a restaurant in town I would like to take you to dinner. So there are all sorts of forms that you need to be aware of for making sure that your duty or your loyalties is strictly to the trust and you're acting simply for the benefit of the members and beneficiaries of the trust. That is how you fulfill your fiduciary duty. Remember all these examples the person or people exerting the influence when you get hit with a cause of action for breach of fiduciary duty saying so and so this or so and so that offered me dinner that doesn't cut it you are on the hook. You pay the price for that. Now there are some examples where someone might be overly sensitive. An example would be a truly neutral referral of an investment manager by a Board member. Say Paul knows an investment manager he thinks would be very good. We have a policy and will bring it to Kevin our investment consultant to have him review in context of that investment manager's expertise for them to do what they usually do review 10 and pick 5 and present to the Board. That is pretty simple following policy someone keeps asking Paul to bring them in he brings them in to Kevin and the Board it's done the usual process. That is not undue influence that is just bringing information to the Board. Where can undue influence come from (1) within the system, (2) other Board members, (3) management, (4) consultants, (5) peers, (6) union members. So it really can come from anywhere. It can come from outside the system, elected officials, and potential business partners, and stake holders, interest groups within the membership and beneficiary groups. So it can come from inside and outside. You have to be very wary of potential for undue influence. The targets are you Board members. It can be the Board as a whole. It can be individual Board members. It could be staff members. Someone could say to Tammi we really want this investment manager; or whoever, unfortunately, Tammi's replacement will be the investment manager to get on as one of the pension managers that they use. She should be reporting that to. Now because this was such a problem and they made it a distinct section at the 2012 NAPPA conference, they have some good ideas for counteracting such influences or counteracting the potential for such influences. Set a tone at the top Board and senior management must not only adopt clear standards, but live by them. Set the mood where you say, as an example, they suggest create policy regarding disclosure of communications and undue influence. They do provide model language that I can provide for you later. Disclosure of communication – disclose any communications that you receive between financially interested persons and members of the Board. If someone reaches out to you Paul, who owns an investment company and said we really want to be a service provider for the Board, bring that to the Board's attention. Create a log. If you have union members saying to you we want this, we want this, we want this, bring that to the Board. Not everything actually that people tell you or that you learn outside of the Board is negative. People may have good intentions. Someone may find information out about an investment manager and bring it to your attention that's very valuable to you. It could be positive or negative. I'm not saying that every communication that you have with someone who is not a member of this Board is bad or that their intent is bad, but in order to make sure you are not creating any look of impropriety or undue influence, you should make communications that you have whether with union presidents, management, members, peers, investment managers, council bring that to the Board. Make it public, if it can be said in private, it can be said in public. Because again you are the fiduciaries here, if there is a breach of your fiduciary duties or in actions brought, it's brought against you as a Board and as individuals. You want to be able to say I have the utmost loyalty to the Board, I follow my duty of care, I follow the prudent investment manager role and I'm doing everything I can to manifest my loyalty to this Board and act in the best interest of the members and beneficiaries because you are going to be on the hook, if you are not doing that. Not anybody who is influencing you or not anybody who's got suggestions, but you because you are the fiduciaries. One person at the last NAPPA conference that I went to, he said he was having problems with a State Board because certain members of the legislature were telling them if you don't vote a certain way they would be removed.*

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**OLD BUSINESS (Cont'd)**

*They voted what was right and what they felt was correct in their fiduciary duties and they were removed. Is that a risk? It is, but at the end of the day you are fulfilling your fiduciary duty and that is the most important thing you can do. One of the things is any tax payer has standing to bring a cause of action against you, if they're a contributing member. I contribute to the 2011 plan as part of my employment, if I think you are doing something wrong, if I think you are breaching fiduciary duty, this is going to be unlikely and I'm not going to do this, that I can foresee. If I said I think they are breaching their fiduciary duty, I'm going to go see how I can bring legal action against them. Let's take Alan Silverman I'm not trying to single out anyone, but he was a former member, who was a retiree. He was very active and very involved in this Board, if he thinks you are breaching your fiduciary duty and he's a retiree receiving money, as a pensioner, he has standing. If you get someone, who has a real problem with you and has an activist attorney they can bring a cause of action against you because they have standing for breach of fiduciary duty. You want to always be on top of that and that you are always fulfilling your fiduciary duties. Your duty of loyalty to the trust no one comes before it. You are in a union and a union presidents says I would like this no sorry my duty is to the Board. That is a great suggestion. I'll bring it to the Board and we'll discuss it, but I have to do what is best for the trust. There can be no competing loyalty. You have to take care you can't have an empty head and good heart. I thought I was doing my best. You have to take the time to educate yourself on matters that are essential to this Board. Investing for what you are doing with this question that arose this morning. Procedures what are the latest procedures what is the best governance best practices? That's another part of your Duty of Care. So your Duty of Loyalty, Duty of Care those are most important nothing else matters except that. Because that is what protects the trust and what protects you should any issue arise.*

*Paul - So NEPC is a fiduciary?*

*Marlaine responded yes because part of their contract they have fiduciary responsibilities to you.*

*Paul - In there contract it doesn't really state that.*

*Marlaine - I haven't reviewed the contract for quite a while, but I think it does state it. I'll review it if you would like me to.*

*The discussion continued on breach self-dealing.*

*Paul – So based on the big components of fiduciary responsibility and looking back at one of the emails you sent to the Board regarding MetLife's selection of investment options, component 3 which you said is our prudent investment review we didn't have an option to make that review when those choices were made for MetLife.*

*Marlaine suggested that the Board invite MetLife in to do a presentation.*

*The Board agreed and will have MetLife present at the August 20, 2014 meeting.*

*A discussion was held on who the Deferred Compensation fiduciaries are.*

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**OLD BUSINESS (Cont'd)**

*Paul – So if the cost for oversight for the 401(a) the Defined Benefit is paid for and managed by NEPC. Who pays the cost of oversight for the Defined Contribution portion is it divided between the County and the Pension Trust?*

*Marlaine – We are going to have to figure out.*

*Tammi – We don't pay any administrative fees to MetLife. The fees come out of the respective funds they are in.*

*Councilman Smiley informed the Board that during the break he took to check in with his office, in that short interim, he was approached by three county employees aware of the action the Board is taking regarding the JP Morgan Settlement.*

**Doug Merrill made a motion for a 5 minute break.**

\*The motion was seconded by Mike Coupe and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

**The meeting reconvened at 10:02 a.m.**

**NEW BUSINESS (Cont'd)**

- Entrust Capital Management firm/portfolio review by Greg Hymowitz and Ellie McNamara.
- Kevin provided a recap on Entrust.
- Review the Preliminary Investment Performance "Flash" report for the period ending June 30, 2014 – *Kevin distributed copies of the Preliminary Investment Performance "Flash" report for the period ending June 30, 2014 along with the Investment Summary Quarter Ending March 31, 2014 for review and discussion. Kevin will provide the Board with 2<sup>nd</sup> quarter commentary from Cupps Capital.*

*Saul – Where do we go from here with Entrust?*

*Kevin – With the new fund that was presented I will send you NEPC's fund write-up prior to next month's meeting. As far as the fund you are in today already it has done a great job, we want you to consider staying with this investment.*

**Ken Porter made a motion to accept NEPC's reports.**

\*The motion was seconded by Terry Stone and approved.

For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich

Against: (0)

*Dan – Before we go anywhere I just want to be clear the topic we spent a lot of time on this morning. During the break I signed the letter that came from the Pension Board, but the question I have is, what are the next steps as far as the outside law firm?*

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**NEW BUSINESS (Cont'd)**

*Marlaine - I will provide the Board a list of NAPPA attorney's and highlight those law firms. You can contact anyone you chose. Once you narrow down the list, you can contact them to see who has expertise.*

*Ken and Terry will also look at their contacts to see who is reputable.*

*Mike Coupe asked if the State Street books' not being closed is a normal occurrence.*

*Tammi informed the Board that it is typical that the reports come out after the meeting.*

*Kevin will ask State Street for their preliminary values, as a solution to the lag.*

*Marlaine – One thing to say to Dan's question is according to NCC Code Section 26.04.602(B) In order to fulfill its fiduciary duties, the Board may, at its sole discretion, by a three-fourths vote of the entire Board, hire independent legal counsel with specific pension expertise to address specific areas of concern to the Board.*

*Paul – One of the action items from last month was that we were going to ask for a letter to the County Executive and County Council requesting an explanation of the intent of HB279. I don't know if we ever got that out.*

*Tammi – No we did not.*

*Saul – The bill did go through the Senate and it was approved unanimously, but it wasn't the Senate Finance committee. It's approved by the Senate, as of June 26<sup>th</sup> so I don't know if it still sits in Finance. It doesn't say where it goes to at this point.*

*Ken – Did the House of Representatives vote on it already?*

*Saul – Yes. It was a house bill so they approved it and it went to Senate.*

*This item will be on the August 20, 2014 pension agenda for discussion.*

*The Chairman personally thanked Tammi for her hard work during her tenure with New Castle County.*

**Saul Polish made a motion to adjourn the meeting at 11:23 a.m.**

*\* The motion was seconded by Terry Stone and approved.*

*For: (11) Barczak, Dunning, Coupe, Frese, McFadden, Merrill, Piekarski, Polish, Porter, Stone and Yurcich*

*Against: (0)*