

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;

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:

Mariorie Webb

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.

Both letters were forwarded to Debbie Lyon, Superintendent of Pensions, who wrote on December 10, 2002, indicating that it was the Superintendent and not

(e) pay by a lump sum to the UW Pension Fund the cost of the benefits

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

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It was not a clear situation - okay. One that one wouldn't

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(b) confirm to the Superintendent in writing that it will develop and implement the

(f) in early 2000 the University of Winnipeg Pension Committee reviewed and

Further in Note 1 of the December 31, 2000 audited financial statements, it indicates:

"As January 10, 2001, the Plan was as follows:

Also note 5B of the audited financial statements reads:

"At December 31st, 2001, the remaining balance of an estimated \$6 422 000 of the defined benefit members' share of the

- (o) On or about May 10, 2002, the DB subcommittee considered a draft proposal to distribute the balance of the surplus which included:

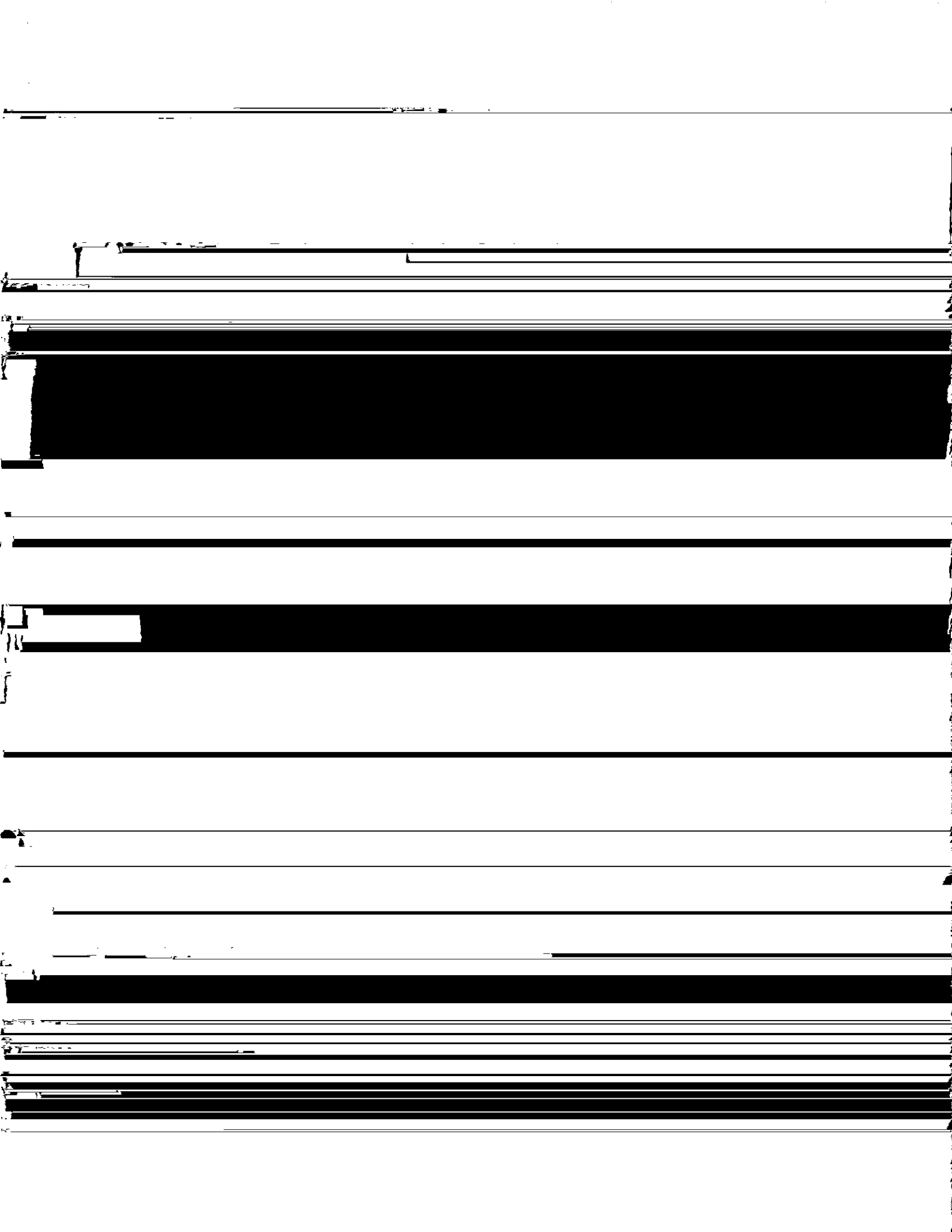
"A. Distribution Rate

1. *The latest figure for the amount of surplus available at December 31, 1999, before any adjustment is made for the pensioner increase in 2001 is \$6,454,000. Please note that this is not the final figure but, as I have indicated before, I do not expect material changes.*

2. *This is made up of*

| | |
|---|------------------|
| a. 50% of original surplus plus investment reserve | \$11,270,000 |
| b. less cost of initial surplus distribution | - 3,038,000 |
| c. less 50% of contribution reserve | - 956,000 |
| d. less full surplus share to DC members in excess of 6.5% | - 624,000 |
| e. less full surplus share to 2000 terminations in excess of 6.5% | - <u>198,000</u> |
| | \$6,454,000 * |

- (p) On June 12, 2002, Dr. Constance Rooke, President of the University of Winnipeg, wrote to all members of the Pension Plan:



2. *that any such distribution in future be subject to the following conditions:*

a. *that at the time of distribution of all or part of the undistributed surplus, the Pension Plan has sufficient surplus at the date of distribution, as confirmed by the Plan's actuary, to enable such a distribution to take place;*

b. *any distribution requires final approval by the Manitoba Pension Commission before it takes place; and*

** * * and agreement to distribute the surplus*

Q. *And that they were going to try to change it to a contingent liability?*

A. *Yes, I did.*

Q. *Okay. When did they convert it to a contingent liability.*

A. *What happened from the end of May to the end of July was*

THE ISSUE TO BE DETERMINED

The issue relates to a group of members (the continuing Defined Benefit members) of the University of Winnipeg plan and whether they had a pension benefit credit as a result of the December 4, 2000 meeting. The applicant:

provided further that no such amendment shall adversely affect the entitlement of any Member accrued prior to the effective date of such amendment other than an amendment which has been approved by the Pension Commission of Manitoba and which is for the sole purpose of avoiding revocation of registration under the Income Tax

The DPA does not prescribe the form that an amendment must take, only

57. The second resolution amending the plan dealt with the following:

- c. the right of the University to take contribution holidays;
- d. the right of the University to return of actuarial surplus during the continuation of the plan;
- e. the right of the University to amend or change the plan;

When looking for guidance on whether to consider subsequent events, the panel reviewed the material supplied by the parties.

As indicated by the Ontario Supreme Court of Justice in *Electrical Industry of Ottawa Pension Plan v Cybulski* [2001] O.J. No. 4593 at para. 22:

22 In the instance of **ambiguous contract language, the interpretation should give effect to reasonable expectations of the parties.** Courts are reluctant to interpret a contract in such a way as to produce an unrealistic result. The Supreme Court has held that the most reasonable and fairest interpretation of a contract is one, which promotes the

In *Dinney v. Great-West Life Assurance Co.* [2006] M.J. No. 401 at para. 13 the Manitoba Court of Queen's Bench indicated that:

“Assuming an ambiguity in the provision, there is an argument to be made that the “subsequent conduct” of the defendants, namely, to use the ‘formula’ demonstrates that this was how they interpreted the document. The Court of Appeal noted, as Laskin J.A. observed in *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (at p. 108):

...subsequent conduct resolves any doubt about the extent of the appellants' liability under art. 10.1. **Subsequent conduct maybe used to interpret a written agreement because ‘it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date’:** S.M. Waddams, *The Law of Contracts*, 3rd ed. (1993), at para. 323. Often, as Thomson
Lynette in Bank of Montreal v. U.S. Trust Co. of N.Y. (1992)

Further, in his argument on February 11, 2008, at page 454 in response to a question from the Chair, Mr. Riley indicated:

"The Chair: The essence as I understand it of your argument, Mr. Riley, is that no amendment is finalized, until it is formalized and submitted to the Pension Commission, is that correct?"

Mr. Riley: No. I think that the, if, if the Board of Regents on December 4th, 2000 had said, had passed a resolution saying we are now amending the plan, right now, unconditionally, and there are the terms that we are going to amend it. And we are going to give the DB surplus, and here is who is going to get it, and here is how it is going to be calculated. I would say that that would be, they then choose not to register that amendment with the Pension Commission. I don't think that would be a problem."

Another issue raised by the University of Winnipeg is that because the form of benefit had not been determined the amendment was not possible. The wording of the resolution indicates that

"The Members' share of the surplus at December 31, 1990, as advised

5. On July 12, 2002, Dr. Constance Rooke wrote to Louise Gordon, Acting Executive Director on the Council on Post Secondary Education, indicating

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9 In the testimony of Barry Berek, contract administrator and board rep for

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If on the other hand we find that an amendment was made by the December 4, 2000 resolution then we are left with the question, was there an amendment that takes away that benefit. To that effect the Panel considered the actions of the Board of Regents, including the October 7, 2002 and the December 9, 2002 meetings at which the Board of Regents passed the following motions:

October 7, 2002:

“that the University will be guided by the following principles in respect to future initiatives to restore the financial health of the University of Winnipeg Pension Plan:

- 1) that **no distribution of the remaining, undistributed surplus**

... be made to the defined benefit plan members that would

EFFECT OF SEPTEMBER 2004 STAKEHOLDERS AGREEMENT

One of the areas that the Commission spent time considering was the effect of the

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In respect to the timing of the actions mentioned in (d), (e) & (f) above, the panel directs the Superintendent to consider appropriate time frames and amend the Order accordingly. In addition, the December 31, 2007 actuarial valuation should reflect the above noted items.

The panel reserves jurisdiction should there be any issues related 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 Retirement Association, their submissions were considered and did assist the Panel in reaching a conclusion.

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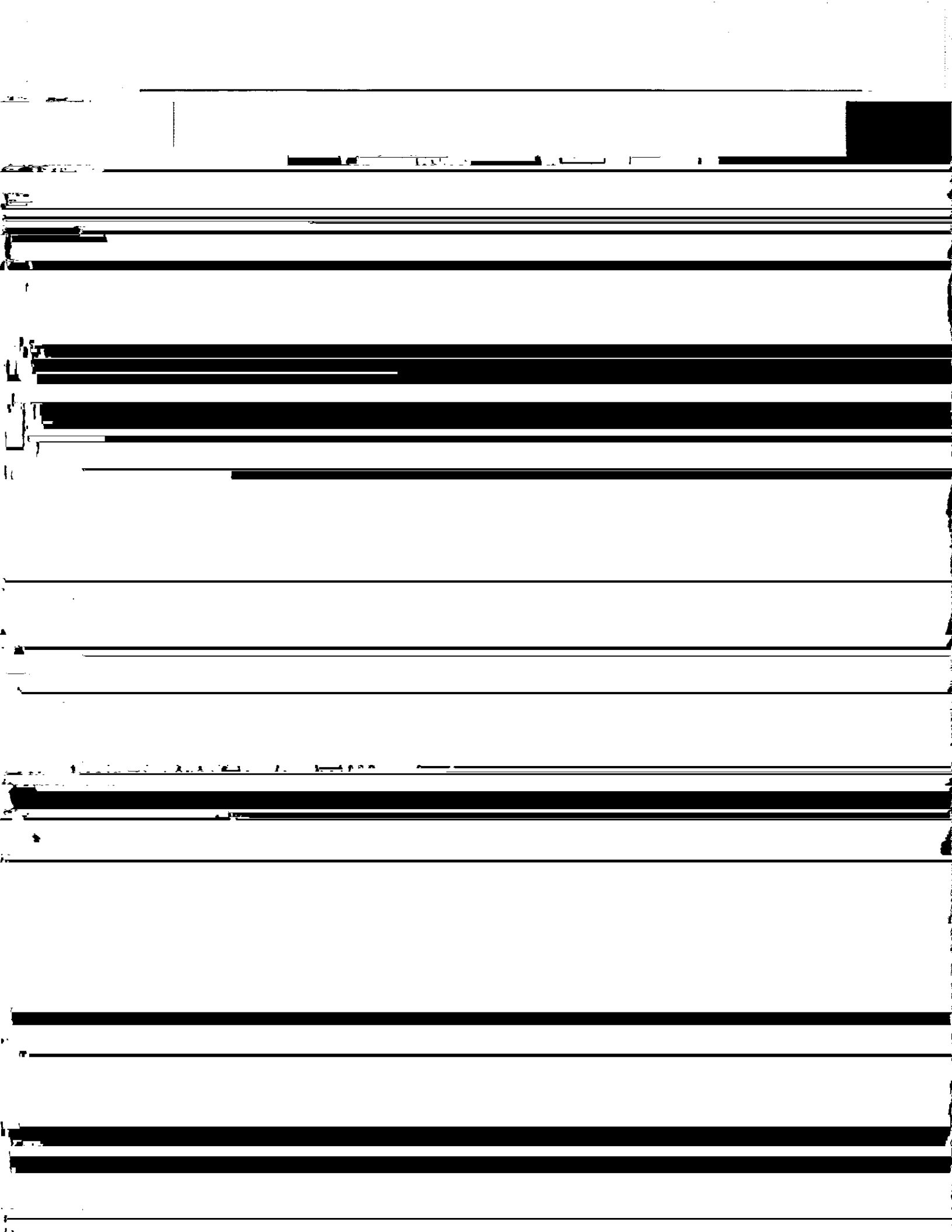
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INTERIM DECISION

These proceedings relate to the University of Winnipeg Pension Plan and an Order of the Superintendent dated November 17, 2006. While there are two separate proposals, the panel will consider both proposals at the same

Written submissions were received from the University of Winnipeg, the University of Winnipeg Faculty Association, the Association of Employees Supporting Education, and the Superintendent of Pensions. The hearing

was held on April 4, 2007, at the University of Winnipeg.



intends to provide verbal evidence they will be required to state the name of the witness and nature of the evidence by May 25, 2007. Parties wishing to produce verbal evidence in response to the documents or witness provided by another party, will be given until June 8, 2007 to indicate the name and nature of the evidence. Prior to June 8, 2007, all parties will be required to indicate if they agree to the material being filed as consent documents. If there are any documents that are in dispute they will be identified and the

~~special procedures will be used to resolve the dispute.~~

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to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not

hearing as their members could very directly be limited by the process of these proceedings.

APPEARANCES:

The Commission:

Robert Ziegler, Chairperson
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Denis Fitzpatrick

Counsel for the Commission:

George Ulyatt

For the Commission:

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INTERIM DECISION

These proceedings relate to the University of Winnipeg Pension Plan and an Order of the Superintendent dated November 17, 2006. While there are two separate appeals, the panel will consider both appeals at the same time.

On January 15th, 2007, the University of Winnipeg filed an appeal of the Order. On January 8th, 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 1/15/07.

The adjournment was subject to Mr. Steffen submitting to the Commission

Jurisdiction to deal with issues not part of the complaint

In his verbal argument he conceded that the Superintendent does have the

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Section 8(3) states

In addition, the parties are requested to clarify their position by October 10.