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FILE NO. 82-059

PENSIONS:
Illinois State Board of
Investment

Judge Robert J. Downing, Chairman
Illinois State Board of Investment
Suite 905
180 North LaSalle Street
Chicago, Illinois 60601

Dear Judge Downing.

I have your letter wherein you ask a series of questions relating to the duties and responsibilities of members of the Illinois State Board of Investments [the Board] under the terms and provisions of recent revisions to the Illinois Pension Code [the Code] (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 1-101 et seq.) made by Public Act 82-960,

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Judge Robert J. Downing - 2.

effective August 25, 1982. Because your questions are not based on a specific set of facts to which I can apply the law, I can respond only with a general analysis of the effect of Public Act 82-960 with reference to the questions you have raised. Consequently, the conclusions reached in this opinion may be subject to modification as specific factual situations arise.

As you are aware, Public Act 82-960 amended section 22A-112 of the Code, which relates to the investment authority of the Board, by adding the following language:

"* * *The board shall have the authority to invest funds, subject to the requirements and restrictions set forth in Sections 1-109, 1-109.1, 1-109.2, 1-110, 1-111, 1-114 and 1-115 of this Code.

* * *

The board shall have the authority to enter into such agreements and to execute such documents as it determines to be necessary to complete any investment transaction.

* * *

..

Further, the amendment deleted those subsections of section 22A-112 which specifically listed the types of investments in which the Board was authorized to invest funds. As is provided in section 22A-112, as amended, the Board is now authorized to invest funds without any specific restriction on the type of investment, but subject to the requirements and restrictions set forth in new or amended sections 1-109, 1-109.1, 1-109.2,

Judge Robert J. Downing - 3.

1-110, 1-111, 1-114 and 1-115 of the Code (to be codified as Ill. Rev. Stat., ch. 108 1/2, par. 1-101 et seq.). Briefly, those sections relate to the duties and responsibilities of fiduciaries of retirement systems and pension funds established under the Code. New sections 1-114 and 1-115 of the Code (to be codified as Ill. Rev. Stat., ch. 108 1/2, pars. 1-114, 1-115) provide a specific statutory basis for civil liability for breach of the fiduciary duties imposed by section 1-109 of the Code (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 1-109, as amended by P.A. 82-960, effective August 25, 1982).

You inquire whether Board members of the Illinois State Board of Investment are fiduciaries under new subsection 1-101.1(a) of the Code (to be codified as Ill. Rev. Stat., ch. 108 1/2, par. 1-101.1). In my opinion, the members are clearly fiduciaries under the express terms of the Act. Moreover, because of the express powers and duties conferred on such members by the Code, the Board members would appear to qualify as fiduciaries under the general law of equity. (Staufenbiel v. Staufenbiel (1944), 388 Ill. 511, 522; Children's Home v. Andress (1942), 380 Ill. 452, 464-65.) Subsection 1-101.1(a) of the Code defines a fiduciary as follows:

" * * * For purposes of this Article, unless the context otherwise requires:

(a) A person is a 'Fiduciary' with respect to a retirement system or pension fund established under this Code to the extent that such person:

Judge Robert J. Downing - 4.

(i) exercises any discretionary authority or discretionary control respecting management of such retirement system or pension fund, or exercises any authority or control respecting management or disposition of its assets;

(ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such retirement system or pension fund, or has any authority or responsibility to do so; or

(iii) has any discretionary authority or discretionary responsibility in the administration of such retirement system.

* * *

"

(Emphasis added.)

Pursuant to section 22A-112 of the Code, as amended, the Board is specifically subject to the requirements and restrictions set forth in section 1-109 of the Code, which relates to the standard of care to be exercised by fiduciaries. Subsection 1-101.1(a) of the Code, as set forth above, defines fiduciary for the purpose of applying relevant sections of article 1 to Board members. Section 22A-101 of the Code provides in part that the Board "is created with authority to manage, invest and reinvest, the reserves, funds, assets, securities and moneys of any pension fund, as provided in this Article". Section 22A-112 of the Code, as amended, vests broad discretion in the Board to invest funds subject only to the requirements and restrictions of sections 1-109, 1-109.1, 1-109.2, 1-110, 1-111, 1-114 and 1-115 of the Code. Consequently, because members of

Judge Robert J. Downing - 5.

the Board exercise discretionary authority and control respecting management of retirement systems and pension funds and exercise authority and control respecting management or disposition of its assets, members of the Board are clearly fiduciaries within the meaning of subsection 1-101.1(a)(i) of the Code. Moreover, the definitional language in subsection 1-101.1(a)(i) is not limited to persons who exercise discretionary authority. By its own terms, subsection 1-101.1(a)(i) defines a fiduciary, in part, as a person who exercises any authority or control respecting management or disposition of assets of a retirement system or pension fund. Consequently, it is possible that a person may breach a fiduciary duty by failing to act in accordance with the standard of care required by section 1-109 of the Code with respect to a ministerial duty.

Secondly, you have inquired whether the director and investment officers of the Board are fiduciaries under section 1-101.1(a) of the Code. Section 22A-110 of the Code (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 22A-110) provides in pertinent part that:

"* * * The board shall appoint a director to administer the affairs of the board subject to and under its supervision and fix his compensation. The Board may appoint investment officers and fix their compensation. With the approval of the board, the director may employ such personnel, professional or clerical, as may be desirable and fix their compensation. The appointment and compensation of the

personnel other than the director and investment officers shall be subject to the Personnel Code.

* * *

(Emphasis added.)

As discussed above, section 22A-112 of the Code provides that the Board is subject to certain restrictions. In accordance with section 1-101.1(a)(i), a person is a fiduciary to the extent that he or she "exercises any discretionary authority or discretionary control respecting management of such retirement system or pension fund, or exercises any authority or control respecting management or disposition of its assets". To the extent that the Board has delegated functions of that nature to the director or investment officers, it appears that those individuals may qualify as fiduciaries under the Code. Section 1-109 of the Code enumerates the duties and standard of care required of a fiduciary. Such fiduciary is required to act solely in the interest of the participants and beneficiaries and:

"(a) For the exclusive purpose of:

(1) Providing benefits to participants and their beneficiaries; and

(2) Defraying reasonable expenses of administering the retirement system or pension fund;

(b) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims;

Judge Robert J. Downing - 7.

(c) By diversifying the investments of the retirement system or pension fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(d) In accordance with the provisions of the Article of the Pension Code governing the retirement system or pension fund.

* * *

"

Therefore, any type of act of a fiduciary which is inconsistent with the standards set out above may be a breach of fiduciary duty for which he or she is liable in accordance with section 1-114 of the Act.

You have also inquired whether a relative of a Board member or employees of the Board have any potential liability under section 1-101.1(b)(v). In accordance with subsection 1-101.1(b), an employee of a retirement system or pension fund or a relative of a board member may qualify as "party in interest" with respect to the system or fund. Section 1-110 of the Code (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 1-110, as amended by P.A. 82-960, effective August 25, 1982) prohibits fiduciaries from engaging in certain transactions with parties in interest. The liability for breach of fiduciary duty imposed by section 1-114, for which an individual is personally liable, does not by its own terms apply to a person who qualifies as a party in interest pursuant to subsection 1-101.1(b) of the Code. However, to the extent that a party in interest

Judge Robert J. Downing - 8.

has profited from a prohibited transaction, it is possible that an action to recover assets properly belonging to the system or fund may be maintained.

You have inquired whether subsection 109.2(b)(1) of the Code (to be codified as Ill. Rev. Stat., ch. 108 1/2, par. 109.2) applies to Board members. As discussed above, section 22A-112 of the Code, as amended, specifically provides that the Board is subject to section 1-109.2 of the Code. Subsection 1-109.2(b)(1) of the Code provides that:

" * * *

(b) With respect to any retirement system or pension fund established under this Code:

(1) Each trustee shall use reasonable care to prevent any other trustee from committing a breach of duty; * * *

* * *

"

The unqualified duty to use "reasonable care to prevent" any other trustee from "committing a breach of duty" is affirmative and clear.

"Reasonable care" has been defined by the Illinois Supreme Court in Roberts v. Chicago City Ry. Co. (1914), 262 Ill. 228, 233. The court stated, at page 233, that:

"* * * ordinary care, reasonable care or due care, which are convertible terms, and mean that degree of care which ordinarily prudent persons are accustomed to exercise under the same or similar circumstances. The term is relative, and, from its definition, necessarily depends on the situation of

the parties in order to determine what a reasonably prudent person would do or omit to do in the same circumstances. * * *

* * *

"

According to the Senate debate on Senate Bill 1579, which became Public Act 82-960 (Senate Debate, May 29, 1982, at 44), the amendments in the bill were originally intended to bring the Illinois provisions more into line with the Federal Employee Retirement Income Security Act of 1974 [ERISA] (29 U.S.C.A. § 1001 et seq.), which contains broad provisions for the protection of employee benefits and provides a statutory basis for liability for breach of a co-fiduciary. Subsection 405(a) of ERISA (29 U.S.C.A. § 1105) provides that:

"(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." (Emphasis added.)

Judge Robert J. Downing - 10.

Although the Federal statute is more detailed than the Illinois provision, the provisions of subsections 405(a)(1), (2), and (3) are relevant for the purpose of determining what duties are incumbent upon a fiduciary with respect to a co-fiduciary.

Additionally, you have inquired as to the application of subsection 1-109.2(b)(1) in the following hypothetical situation:

"There are 9 members on the board. As to a proposed investment the board approves and authorizes it by a vote of 5-4. The investment turns sour and the board sustains a loss. A participant brings suit. Can a trustee who voted with the '4' in the minority be liable under section 1-109.2(b)(1)?"

I will generally discuss the statute as it relates to your inquiry.

As an initial matter, the statute does not impose liability on any Board member in a situation where an investment turns out to be a poor investment but where the Board member or Board collectively, when selecting the investment, acted in the manner prescribed by section 1-109 of the Code. Section 1-109 provides, in part, that:

"* * * A fiduciary with respect to a retirement system or pension fund established under this Code shall discharge his or her duties with respect to the retirement system or pension fund solely in the interest of the participants and beneficiaries and:

(a) For the exclusive purpose of:

(1) Providing benefits to participants and their beneficiaries; and

(2) Defraying reasonable expenses of administering the retirement system or pension fund;

(b) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims;

(c) By diversifying the investments of the retirement system or pension fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(d) In accordance with the provisions of the Article of the Pension Code governing the retirement system or pension fund." (Emphasis added.)

Where certain members of the Board insist on making an investment which from the outset is clearly not prudent, subsection 1-109.2(b)(1) mandates that the other members "use reasonable care to prevent" the others from breaching their fiduciary duty.

You have also posed several questions with reference to section 1-114 of the Code, as amended (to be codified as Ill. Rev. Stat., ch. 108 1/2, par. 1-114), which provides in pertinent part that:

" * * *

(a) Any person who is a fiduciary with respect to a retirement system or pension fund established under this Code who breaches any duty imposed upon fiduciaries by this Code shall be personally liable to make good to such retirement system or pension fund any losses to it resulting from each such breach, and to restore to such retirement system or pension fund any profits of such fiduciary which have been made through use of assets of the retirement system or pension fund by the fiduciary, and shall be subject to such equitable or remedial relief as the court may

Judge Robert J. Downing - 12.

deem appropriate, including the removal of such fiduciary.

* * *

"

Section 22A-112 of the Act, as amended, expressly provides that the Board is subject to section 1-114. Therefore, section 1-114 is directly applicable to Board members and employees of the Board who are fiduciaries. With reference to the extent of liability imposed, subsection 1-114(a) provides, firstly, that a fiduciary "shall be personally liable to make good to such retirement system or pension fund any losses to it from each such breach". Secondly, subsection 1-114(a) mandates that a fiduciary who breaches any duty must "restore to such retirement system or pension fund any profits of such fiduciary which may have been made through use of assets of the retirement system or pension fund by the fiduciary". Finally, subsection 1-114(a) provides that the fiduciary "shall be subject to such equitable or remedial relief as the court may deem appropriate including the removal of such fiduciary".

You have asked whether the Board may pay a judgment rendered against a Board member or employee pursuant to section 1-115 of the Code, as amended (to be codified as Ill. Rev. Stat., ch. 108 1/2, par. 1-115). Sections 1-107 and 1-108 of the Code (Ill. Rev. Stat. 1981, ch. 108 1/2, pars. 1-107, 1-108) contain specific provisions related to indemnification

Judge Robert J. Downing - 13.

of trustees, consultants and employees of retirement systems and pension funds and representation and indemnification of employees of pension funds. Board members and employees of the Illinois State Board of Investment are not by those terms included within the coverage of those sections. Moreover, section 22A-112 of the Code, as amended, does not make sections 1-107 and 1-108 applicable to the Board. It is a fundamental principle of statutory construction that the mention or enumeration of one or more certain things in a statute excludes all others not mentioned. (In re Estate of Leichtenberg (1956), 7 Ill. 2d 545, 552; People ex rel. Cadell v. Board of Fire and Police Com'rs (1952), 345 Ill. App. 415, 419.) Consequently, no authority exists in article 22 of the Code for the Board to purchase insurance to indemnify its fiduciaries against any liabilities arising from sections 1-114 or 1-115 of the Code or to pay a judgment on behalf of a fiduciary. Therefore, it would appear amendatory legislation would be necessary in order to make the provisions of sections 1-107 and 1-108 of the Code applicable to members and employees of the Illinois State Board of Investment.

Finally, you have inquired whether the Attorney General will represent any Board member or employee in any litigation arising in his or her official capacity from sections 1-114 or 1-115 of the Code. It should be stressed

Judge Robert J. Downing - 14.


that, because you have provided no facts upon which I can specifically base an answer, I can only generally discuss your inquiry. The question of whether the Attorney General shall represent any individual must be determined on a case-by-case basis.

Section 4 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1981, ch. 14, par. 4) provides that it shall be the duty of the Attorney General "to defend all actions and proceedings against any State officer, in his official capacity, in any of the courts of this state or the United States". The question of whether an individual is a State officer depends upon the character of the duties an officer is required to perform. (People ex rel. v. Barrett (1943), 382 Ill. 321, 344-45.) According to section 22A-101 of the Code, the Board is created with the authority "to manage, invest, and reinvest, the reserves, funds, assets, securities and moneys of any pension fund, as provided in this Article, and to perform such other duties as may from time to time be authorized by the General Assembly". The members of the Board have significant powers and perform significant State duties. Consequently, if sued in their official capacity, the Board members may be represented by the Attorney General. In addition to his statutory duties and powers, the Attorney General possesses any common law powers inherent in the

Judge Robert J. Downing - 15.

office. (People ex rel. Castle v. Daniels (1956), 8 Ill. 2d 43, 47.) At common law, the Attorney General was the law officer of the crown and its chief representative in the courts. As the chief law officer of the State, except where the constitution or a constitutional statute may provide otherwise, he is the sole official advisor of the executive officers and of all boards, commissions and departments of State government, and it is his duty to conduct the law business of the State. (Fergus v. Russel (1915), 270 Ill. 304, 336-37, 342.) Consequently, there may be situations where it would be proper for the Attorney General to represent an employee in litigation arising in his official capacity. However, in a situation where an officer or employee is sued personally for breach of fiduciary duty, it is unlikely, in any case, that it would be proper for the Attorney General to represent that officer or employee. Again, I must emphasize that, absent a specific case, I am unable to comment on the propriety of the provision of representation for any person.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John C. ...", written in dark ink.

A T T O R N E Y G E N E R A L