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FILE NO. S-1349

APPROPRIATIONS:
Substantive Matter in
An Appropriation Bill

Michael L. Mory
Executive Secretary
State Employees' Retirement System
1201 South Fifth Street
Springfield, Illinois 62706

Dear Mr. Mory:

I have your letter wherein you ask for my opinion concerning the validity of section 2a of Public Act 80-142, which appropriates money for the ordinary and contingent expenses of the State Employees' Retirement System from the accumulated funds of the Retirement System. Section 2a reads in part as follows:

"Section 2a. From funds accumulated pursuant to section 14-169 and Section 14-170 [renumbered sections 14-131 and 14-132 by Public Act 80-841] of the 'Illinois Pension Code' approved March 18, 1963, as amended, the following named sums, or so much thereof as may be necessary, respectively,

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for the objects and purposes hereinafter named,
are appropriated to meet the ordinary and contingent
expenses of administration of the State Employees'
Retirement System:

* * *

You state in your letter that "this action we believe violates the basic concept of a Trust Fund and could impede our Board's ability to carry out their fiduciary responsibilities as trustees".

The State Employees' Retirement System of Illinois was created to provide retirement annuities and other benefits for State employees. It is a trust, separate and distinct from all other entities. (Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-134.) The cash and property of the System are held in trust for the purposes of the Act. (Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-101.) A separate account, consisting of income of the System, is kept in the State Treasury to pay allowances, annuities, benefits and administration expenses. Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-132.

Responsibility for the operation of the System and for effecting the provisions of article 14 of the Pension Code, by which the System is established, is vested in the Board of Trustees. The Board pays the expenses necessary for operation of the System as determined and approved by

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the Board. Section 14-134 (Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-134) of the Pension Code specifically provides in part:

"§14-134. Board created. The retirement system created by this Article shall be a trust, separate and distinct from all other entities. The responsibility for the operation of the system and for making effective this Article is vested in a board of trustees.

* * *

Section 14-135.09 (Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-135.09) provides also in part that the Board is authorized:

"§14-135.09. To obtain services. To obtain, pursuant to the 'Personnel Code', approved July 18, 1955, as now or hereafter amended, an executive secretary, an actuary and such medical and other services as shall be required to transact the business of the system; and to pay the expenses of the board necessary for the operation of the system at such rates and in such amounts as the board determines and approves."

In Ill. State Employees' Assn. v. McCarter (1973), 9 Ill. App. 3d 764, the court held that the legislature in establishing a procedure for the funding of pensions did not make the establishment of the contribution rate subject to modification by the Director of Finance. The Director had disapproved the rate of State contributions for budgetary reasons. The court stated at page 769:

* * *

* * * The general language of the powers and

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duties of the Director of Finance under the Civil Administrative Code cannot be held to override the specific powers and duties given him in the State Employees' Retirement System of Illinois Act. To permit such an interpretation would, in effect, render several specific sections and provisions of the System Act a complete nullity.

* * *

The only function left to the General Assembly is to appropriate the required State contribution to various State agencies for them to pay over to the System (Ill. Rev. Stat. 1977, ch. 108 1/2, par. 14-131). Thus, provisions of the Act make clear that the System is to be run by the Board, as trustees of the trust, independent of other governmental agencies. This responsibility necessarily includes independent control of the use of Retirement System funds.

Historically, this is the way the General Assembly has treated the funds. The General Assembly has never appropriated the amounts to be paid out in retirement and other benefits. It has never before appropriated the accumulated funds of the Retirement System for administrative expenses. In fact, in the last five years, none of the expenses of the Retirement System have been appropriated by the General Assembly. They have been paid by the Board from the System's funds. Prior to that the expenses were appropriated from the General Revenue Fund. For instance, see 1963 Laws 1398 and 1967 Laws 1553.

By determining the amounts and rates of administra-

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tive expenses of the Retirement System to be paid from the System's funds, section 2a of Public Act 60-142 purports to change the authority and responsibility granted the Board of Trustees in the Pension Code. This is substantive matter in an appropriation bill which is prohibited by section 8(d) of article IV of the Constitution.

Section 8(d) of article IV of the Illinois Constitution of 1970 provides in relevant part: "Appropriation bills shall be limited to the subject of appropriations". In opinion No. S-1097 (1976 Ill. Att'y. Gen. Op. 192), I advised the Comptroller that an appropriation bill which changed existing substantive law was itself substantive; I thus concluded that the section of the appropriation bill considered in the opinion violated section 8(d) of article IV. The opinion relied heavily on decisions of courts of other jurisdictions whose constitutions contained limitations on appropriation bills that were similar to the limitation in section 8(d).

Since the issuance of opinion No. S-1097, the Illinois Supreme Court has clarified the meaning of the limitation in section 8(d). In the case of Benjamin v. Devon Bank (1977), 68 Ill. 2d 142, 148, the court held that section 5.3 of Public Act 79-1267 violated section 8(d) of article IV. The court stated:

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* * *

* * * For the decision of the question presented, it suffices that section 5.1 of the appropriation bill purported to change the existing general substantive law, that it was therefore itself substantive in nature, and could not be included in the appropriation bill. * * *

* * * We agree that the General Assembly may restrict and qualify the use to which funds appropriated may be put, but such qualifications and restrictions may not, in an appropriation bill, change existing statutes.

* * *

"

The interpretation of section 8(d) of article IV by the court in Benjamin is that an appropriation bill may not change an existing statutory provision.

According to this interpretation, section 2a of Public Act 80-142 violates section 8(d) of article IV because section 2a purports to change the substantive provisions of the Pension Code which vest control over expenditures from the accumulated funds of the Retirement System in the Board of Trustees rather than in the General Assembly. These substantive provisions may not be in an appropriation bill. Therefore, it is my opinion that section 2a of Public Act 80-142 is invalid.

It is my understanding that the General Assembly appropriated these funds in the belief that it was required

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to do so by section 2(b) of article VIII of the Constitution which provides that the General Assembly, by law, shall make appropriations for all expenditures of public funds by the State. The Constitution does not define the term "public funds" and neither the General Assembly nor the Illinois Supreme Court has defined the term as used in section 2(b) of article VIII of the Constitution. Certainly in a broad sense, all public funds in the hands of a public agency are public funds. Public pension funds in some instances have been considered public funds. (60 Am. Jur. 2d, Pension and Retirement Funds §65 (1972).) However, given the Retirement System funds are trust funds held in a separate and distinct account to be used to meet pension obligations and contain contributions by individual members as well as the State, it could be argued that they are not public funds as used in section 2(b) of article VIII of the Constitution. A determination of the question is not necessary or dispositive of the question asked.

A determination by me that these are not public funds would not necessarily prohibit their appropriation by the General Assembly. Section 2(b) of article VIII is a mandate that the General Assembly appropriate public funds. It is not a prohibition against the appropriation of other

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funds over which the State has control even if not considered public funds (if indeed there are such funds).

A determination that they are public funds, however, would not mean that an annual appropriation is necessary as was attempted in Public Act 80-142. The Constitution of 1970 permits continuing and other types of appropriations. By law, in establishing the State Employees' Retirement System in the manner in which it did, the General Assembly may have provided what is, in fact, a continuing appropriation of funds in control of the Board.

Without deciding these questions, I am of the opinion that for the reasons discussed above section 2a of Public Act 80-142 is invalid, but that the Board of the State Employees' Retirement System has authority to pay the retirement and administrative expenses in accordance with law. There is no distinction in the character of funds used for benefits and for expenses. All come from the same trust account and are governed by the same statutory provisions. This State has a statutory and constitutional (Ill. Const. 1970, art. XIII, § 5) obligation to provide pension benefits and the expenditure of funds for such purposes could be made even without an appropriation. Antle v. Tuchbreiter (1953), 414 Ill. 571; Rouff v. Barrett (1947), 396 Ill. 322.

Very truly yours,

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