



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

August 15, 2002

Jim Ryan
ATTORNEY GENERAL

FILE NO. 02-008

PENSIONS:
Filling Vacancy in Newly
Created Position on Teachers'
Retirement System Board

Mr. Jon Bauman
Executive Director
Teachers' Retirement System
P.O. Box 19253
Springfield, Illinois 62794-9253

Dear Mr. Bauman:

I have your letter wherein you inquire regarding the propriety of the appointment of an additional annuitant member to the board of trustees of the Teachers' Retirement System under the provisions of Public Act 91-941, effective February 6, 2001. For the reasons hereinafter stated, it is my opinion that because the effective date of the legislation creating the new position was less than 90 days prior to the date fixed for the election of members to the board, the board properly appointed an annuitant member to serve in the newly-created position for a full term.

Public Act 91-941 increased the membership of the board of trustees of the Teachers' Retirement System from 10 members to 11, and provided for the election of a second annuitant member to fill the newly-created position. As amended, section 16-165 of the Illinois Pension Code (40 ILCS 5/16-165 (West 2000)) provides, in pertinent part:

"Board; elected members; vacancies.

* * *

(b) One elected annuitant trustee shall first be elected in 1987, and in every fourth year thereafter, for a term of 4 years beginning July 15 next following his or her election.

(c) The elected annuitant position created by this amendatory Act of the 91st General Assembly [Public Act 91-941] shall be filled as soon as possible in the manner provided for vacancies, for an initial term ending July 15, 2001. One elected annuitant trustee shall be elected in 2001, and in every fourth year thereafter, for a term of 4 years beginning July 15 next following his or her election.

(d) Elections shall be held on May 1, unless May 1 falls on a Saturday or Sunday, in which event the election shall be conducted on the following Monday. Candidates shall be nominated by petitions in writing, signed by not less than 500 teachers or annuitants, as the case may be, with their addresses shown opposite their names. The petitions shall be filed with the board's Secretary not less than 90 nor more than 120 days prior to May 1. The Secretary shall

determine their validity not less than 75 days before the election.

* * *

(f) A vacancy occurring in the elective membership on the board shall be filled for the unexpired term by the board with a person qualified for the vacant position." (Emphasis added.)

Public Act 91-941 was signed by the Governor and became effective on February 6, 2001, which was only 83 days prior to May 1, 2001, the date upon which the new trustee was scheduled to be elected under subsection 16-165(d) of the Code. Consequently, it was not possible for candidates to file nominating petitions for election to the new office at least 90 days before the date of the election, as is required by subsection 16-165(d) of the Code.

Although subsection 16-165(c) of the Code, as amended, provided that the newly-created position was to be filled as soon as possible in the manner provided for filling vacancies, for an initial term ending on July 15, 2001, the information that you have provided indicates that no appointment was made prior to that date. Although the board of trustees addressed the matter at its meetings of March 29, 2001, and May 24-25, 2001, the board was unable to reach a consensus on any candidate. The board next met on August 9, 2001, at which time a motion was adopted to

appoint an annuitant trustee to the new position for a full term ending July 15, 2005. Questions have subsequently been raised concerning whether an election was required to be held in 2001 to fill the new position, notwithstanding the impossibility of nominating candidates in accordance with the statutory requirements, and, if not, whether the trustee who was appointed on August 9, 2001, was properly appointed to serve a full, four year term.

I note that similar circumstances were created by the enactment of Public Act 78-189, effective October 1, 1973, which increased the membership of the Teachers' Retirement System board of trustees from five to nine members. In opinion No. S-669, issued December 6, 1973, Attorney General Scott concluded that vacancies in office for the four new board members were created upon the enactment of the law, and that those vacancies should be filled in the manner provided for the filling of vacancies until the dates provided by statute for election or appointment to regular four year terms. 1973 Ill. Att'y Gen. Op. 231.

Although the language of amended subsection 16-165(c) clearly provides that the new office of annuitant member was to "be filled as soon as possible in the manner provided for vacancies", the board was apparently unable to agree upon a candidate, and the statutory directive to fill the vacancy for a term ending

July 15, 2001, was therefore unexecuted. There can be no doubt, however, that the office was created upon the effective date of Public Act 91-941 and, upon creation, that a vacancy immediately existed therein.

Because the effective date of Public Act 91-941 occurred less than 90 days before May 1, 2001, the board could not meet the election requirements provided by statute. The right to hold an election is not inherent, but must be conferred by the constitution or by statute. (Bergeson v. Mullinix (1948), 399 Ill. 470, 476.) There can be no election where there is no warrant of law for holding it. A mere voluntary assemblage of persons, although qualified voters, and the expression of their choice upon a proposition submitted to them in any way other than that authorized by law does not constitute an election. (People ex rel. Travis v. Rogier (1927), 326 Ill. 310, 319.) The Teachers' Retirement System board is authorized by statute to hold elections only at specified times, and only in the manner set out by statute. The board has no authority to set an alternative date, or to devise some means of nomination for election other than that provided for in section 16-165 of the Code, and any attempt to do so would be void.

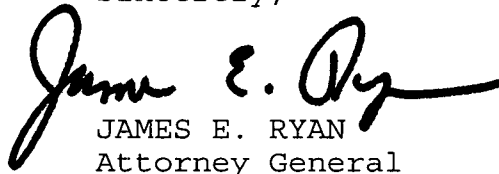
The cardinal rule of statutory construction is to ascertain and give effect to the intention of the General Assembly. (In re D.L. (2000), 191 Ill. 2d 1, 9.) The plain language of subsection 16-165(c) demonstrates that the primary intention of the General Assembly with respect to Public Act 91-941 was to add an additional annuitant member to the Teachers' Retirement System board immediately. Although the legislation made no provision for the contingency that it might become effective too late to allow for the election of the additional annuitant member on May 1, 2001, every attempt should be made to carry out the intent of the Act to the extent possible, in accordance with the purpose of the statute as a whole.

Because no nominations could be made within the statutory filing period, and, therefore, no election could be held on May 1, 2001, a vacancy was created in the office of annuitant member for the term beginning July 15, 2001. Article 16 of the Pension Code (40 ILCS 5/16-101 et seq. (West 2000)) provides no mechanism for a special election to fill a vacancy. Rather, subsection 16-165(f) of the Code provides that a vacancy in the elective membership on the board shall be filled for the unexpired term by appointment of the board. It is my opinion, therefore, that the annuitant member selected by the board on

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August 9, 2001, to fill the vacancy was properly appointed to
serve a full term of office ending on July 15, 2005.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Ryan". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

JAMES E. RYAN
Attorney General