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FILE NO. 91-041

PENSIONS:  
Investment Management

Honorable Donald Saltsman  
Vice Chairman, House Personnel  
and Pensions Committee  
804 Main Street  
Peoria, Illinois 61603

Dear Representative Saltsman:

I have your letter wherein you inquire, firstly, whether a Police Pension Fund has authority to appoint one or more investment managers as fiduciaries to manage assets of the fund in accordance with section 1-109.1 of the Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 1-109.1), and, secondly, whether the trustees of such a pension fund may appoint a national bank, a State bank, a trust company or a member of the National Association of Security Dealers to act as custodians of the investments of the fund.

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Police pension funds are established under article 3 of the Illinois Pension Code. (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-101 et seq.) Section 3-149 of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-149) provides:

"General provisions and savings clause. The provisions of Article 1 and Article 23 of this Code apply to this Article as though such provisions were fully set forth in this Article as a part thereof."

With respect to your first question, section 1-109.1 of the Illinois Pension Code provides, in part:

"Allocation and Delegation of Fiduciary Duties. (1) Subject to the provisions of Section 22A-113 of this Code and subsections (2) and (3) of this Section, the board of trustees of a retirement system or pension fund established under this Code may:

(a) Appoint one or more investment managers as fiduciaries to manage (including the power to acquire and dispose of) any assets of the retirement system or pension fund; and

(b) Allocate duties among themselves and designate others as fiduciaries to carry out specific fiduciary activities other than the management of the assets of the retirement system or pension fund.

\* \* \*

"

Section 22A-113 of the Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 22A-113) and subsection 1-109.1(2) are not, by their terms, applicable to funds established under article 3 of the Illinois Pension Code. Subsection 1-109.1(3) preempts home rule power with respect to pension fund investments.

Because section 3-149 of the Illinois Pension Code expressly provides that article 1 of the Code is applicable to pension funds established under article 3, section 1-109.1 operates as a direct grant of authority to trustees of such funds. Therefore, it is my opinion that the board of trustees of a police pension fund is authorized by section 1-109.1 of the Code to appoint one or more investment managers as fiduciaries to manage the assets of the fund.

The term "investment manager" is defined in subsection 1-101.1(c) of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2 par. 1-101.1(c)), which provides, in part:

" \* \* \*

(c) A person is an 'Investment manager' with respect to a retirement system or pension fund established under this Code if such person:

(i) is a fiduciary appointed by the board of trustees of a retirement system or pension fund in accordance with Section 1-109.1;

(ii) has the power to manage, acquire or dispose of any asset of the retirement system or pension fund;

(iii) is either--

(A) registered as an investment advisor under the Investment Advisors Act of 1940 (15 U.S.C. 80b-1, et seq.);

(B) a bank, as defined in that Act; or

(C) an insurance company; and

(iv) has acknowledged in writing that he is a fiduciary with respect to the retirement system or pension fund." (Emphasis added.)

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Any investment manager who is appointed to manage pension funds must meet the requirements of subsection 1-101.1(c).

With respect to custody of investments in a police pension fund, section 3-135 of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-135) provides that:

" \* \* \*

\* \* \* All securities shall be deposited with the treasurer of the municipality, and be subject to the order of the board. \* \* \*

\* \* \* "

Section 3-132 of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 3-132) provides that is the duty of the board:

"To control and manage the pension fund. To control and manage, exclusively, the pension fund, and all money donated, paid or assessed for the pensioning of disabled and retired police officers, their surviving spouses, minor children and dependent parents. All such moneys shall be placed by the treasurer of the municipality to the credit of the fund, subject to the order of the board."

All those sections of the Pension Code which authorize the appointment of investment managers and other fiduciaries are in pari materia with the requirement that securities be deposited with the treasurer and be subject to the order of the board. Sections of a statute which are in pari materia should be considered with reference to one another so that all sections may be given harmonious effect. (People v. Scheib

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(1979), 76 Ill. 2d 244.) Considering these provisions together, it is my conclusion that while securities are to be deposited with the treasurer in an accounting sense, the board has the authority to order the treasurer to place them in the hands of a manager so as to permit the board to exercise its control and management duties.

This construction of these sections is supported by reference to section 3-10-3 of the Municipal Code (Ill. Rev. Stat. 1989, ch. 24, par. 3-10-3), which prescribes the general duties of the municipal treasurer with respect to the deposit of city funds. Section 3-10-3 provides, in pertinent part:

"The municipal treasurer may be required to keep all funds and money in his custody belonging to the municipality in such places of deposit as may be designated by ordinance, and, when requested by the municipal treasurer, the corporate authorities shall designate one or more banks or savings and loan associations in which may be kept the funds and money of the municipality, in the custody of the treasurer. \* \* \*

\* \* \*

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Clearly, funds which are deposited with the treasurer, and which are therefore in his custody, may nevertheless be deposited or placed by the treasurer in a bank or other institution upon order of the corporate authorities having control of the funds.

If investment securities could not be dealt with in a similar manner, the board's power to manage and control them

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would be considerably limited. I note that, in considering the investment powers of the Illinois State Board of Investment, Attorney General Scott, in opinion No. S-261 (1971 Ill. Att'y Gen. Op. 15, 19), observed:

" \* \* \*

Further, I have also looked at contemporary circumstances in the securities market place. Courts, in seeking to arrive at intentions of legislatures with regard to legislation, consider it proper to look at existing circumstances and contemporary conditions. First National Bank vs. Wedron Silica Co., 1933, 351 Ill. 560; Bowman vs. Industrial Commission, 1919, 289 Ill. 126. I have, therefore, taken official notice of the majority of the transfer agents of listed and unlisted corporations. In numerous circumstances, transfer agents require the execution of stock powers by each and every one of the members of boards similar to the I.S.B.I. To call upon all members of that board on each and every occasion where a common stock was bought or sold to execute stock powers would seriously impair and frustrate the purpose of the enabling legislation. Stocks could not be bought and sold quickly, and delivery would sometimes be held up for a period of 30 to 60 days depending upon the individual requirements of each transfer agent. The I.S.B.I. would be seriously handicapped in trading equity securities. It could not be done, and thus the intention of the General Assembly would be thwarted. However, these circumstances are remedied by the use of a nominee. By using a nominee, the I.S.B.I. is enabled to have the full faith and credit of a large financial institution to guarantee good title of each of its securities, and obviates the necessity of the execution of many stock powers by its members. The use of a nominee would thus put the I.S.B.I. on equal footing with other high volume trading investors who likewise call upon the full faith credit or financial institutions to guarantee good title as a nominee.

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For similar reasons, the General Assembly has authorized pension fund trustees to appoint investment managers and to designate other fiduciaries to carry out specific fiduciary activities other than asset management. (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 1-109.1.)

It is unclear from your letter how an appointed "custodian" would differ from an "investment manager", and what the responsibilities of the custodian would be with respect to investments. If the "custodian" is simply a depository with which the treasurer is ordered to deposit investments, then such an arrangement would not deviate from the general requirement that securities be deposited with the treasurer. The board may reasonably order the treasurer to deposit funds or investments in such a manner as to make them readily subject to the board's management authority. Because section 3-135 of the Illinois Pension Code specifically requires that investments be deposited with the treasurer, however, it would be improper for the board to bypass the treasurer and deposit investments directly with an alternative custodian. Moreover, if the "custodian" is an entity which is given any management authority over fund assets, it should be designated an investment manager in compliance with the requirements of sections 1-109.1 and 1-101.1(c) of the Pension Code.

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For the reasons stated, it is my opinion that the board of trustees of a police pension board may appoint one or more investment managers to manage assets of the fund. The board may also designate a depository to hold a custodial account, but if the custodian is given management authority over the funds, it must meet the statutory definition of "investment manager".

Respectfully yours,

A handwritten signature in cursive script, appearing to read "Roland W. Burris".

ROLAND W. BURRIS  
ATTORNEY GENERAL