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RETIREMENT SYSTEMS: Authority to invest funds of retirement systems.

STATE TREASURER: Authority to invest funds of retirement system.

The State Employees' Retirement Board, the Public School Employees' Retirement Board, the Judges' Retirement Board, and the Probate Judges' Retirement Board have no fiduciary financial obligation or liability with regard to the investment of funds of their respective retirement systems.

The State Treasurer has the authority to invest the funds of the State Employees' Retirement System, the Public School Employees' Retirement System, and the Probate Judges' Retirement System.

The Investment Advisory Committee has the authority to invest the funds of the Judges' Retirement System.

Opinion No. 4854

January 17, 1975.

Mr. Stephen Van Note, Director
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Lansing, Michigan

You have requested my opinion on the following question:

"Do the State Employees' Retirement Board established by Act 240 of the Public Acts of 1943, as amended; the Public School Employees' Retirement Board, established under Act 136 of the Public Acts of 1945, as amended; the Judges' Retirement Board established under Act 198 of the Public Acts of 1951, as amended; and the Probate Judges' Retirement Board, established under Act 156 of the Public Acts of 1954, as amended, have any fiduciary financial responsibility with regard to the investment of funds of the respective retirement systems?"

As your request notes, these retirement boards were transferred to the Department of Management and Budget,¹ Executive organization act of 1965, 1965 PA 380, § 106; MCLA 16.206; MSA 3.29(106). 1965 PA 380, § 91, *supra*, provides, in pertinent part:

"The investment functions of the boards named in subsections (a),² (c),³ (d),⁴ (e)⁵ and (f)⁶ of section 106 are transferred to the department of treasury. Notwithstanding the provisions of any other act, the state treasurer shall invest, reinvest, assign, reassign, sell, transfer, and manage the investment funds and portfolios of the re-

¹ This department was formerly the Department of Administration; it is now called the Department of Management and Budget. 1973 PA 127, § 1.

² Judges' Retirement Board.

³ Probate Judges' Retirement Board.

⁴ Public School Employees' Retirement Board.

⁵ State Employees' Retirement Board.

⁶ State Police Pension Board of Review.

spective retirement systems and may use nominees to facilitate transfers. The state treasurer or his designee shall have the authority to execute all necessary instruments to effectuate said purposes. The state treasurer shall report all investment transactions to the department of administration promptly and to the respective retirement boards, and to the attorney general, not less than once every 3 months. There is hereby created an investment advisory committee composed of the director of the department of commerce, the director of the department of administration, or their duly authorized representatives, and 3 public members appointed for 3-year terms by the governor with the advice and consent of the senate. . . . The investment advisory committee shall meet at least once each quarter. They shall review investments, goals and objectives of each of the retirement funds and may submit recommendations therefor. They may also, by a majority vote, direct the state treasurer to dispose of any holding or holdings, which in their judgment is not suitable for the fund involved, and may by unanimous vote direct the treasurer to make specific investments. . . .”

Thus, investment functions of the four retirement boards cited in your question were transferred by 1965 PA 380, § 91, *supra*, to the state treasurer. In light of this transfer, you ask whether the four boards now have any fiduciary financial responsibility with regard to investments for their respective retirement systems.

The word “fiduciary” refers to the relationship that exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment and advice of another. *Potter v Chamberlin*, 344 Mich 399; 73 NW2d 844 (1955). As an example of the obligations and liability of a fiduciary, it will be noted that the court, in *In re Tolfree Estate*, 347 Mich 272, 282-283; 79 NW2d 629, 634-635 (1956), stated:

“ . . . The precise sum plaintiff [beneficiary] should receive and which defendant [fiduciary] should pay is what the former has lost by the failure of the latter to properly administer the estate. . . .”

“Good faith is a defense, where a trustee, acting within the limits of his powers with proper prudence and diligence, commits mere mistakes or errors of judgment, but is not a defense where a trustee disregards the limits placed upon his power by law or by the trust instrument. . . .”

It should be noted that 1943 PA 240, § 8; MCLA 38.8; MSA 3.981(8), grants the State Employees’ Retirement Board the power to “invest and reinvest the funds of the system.” Likewise, the Public School Employees’ Retirement Board is authorized by 1945 PA 136, Ch I, § 8; MCLA 38.208; MSA 15.893(8), to direct “the investment of moneys in the retirement fund . . . subject to the approval of the state treasurer.” For the Probate Judges’ Retirement System, 1954 PA 165, § 25; MCLA 38.925; MSA 27.3178(60.25), gave the State Administrative Board the power to invest the funds of the system. Although these acts have never been explicitly repealed, they predate 1965 PA 380, § 91, *supra*, as added by 1968 PA 45,

and as last amended by 1969 PA 232, which transferred the investment functions of the three retirement systems to the state treasurer.

Although the repeal of a statute by implication is not favored, a later act will repeal an earlier one to the extent that the two are repugnant. *Locke v Macomb County*, 31 Mich App 22; 187 NW2d 500 (1971), aff'd 387 Mich 634; 199 NW2d 166 (1972). Further, where the legislative intent is clear, repeal by implication may be likewise achieved by the occupancy of an entire field by a subsequent enactment. *Washtenaw County Road Commissioners v Public Service Commission*, 349 Mich 663; 85 NW2d 134 (1957). The intent and breadth of 1965 PA 380, § 91, *supra*, must, therefore, be considered.

1965 PA 380, § 91, *supra*, gave the state treasurer the duty of investing the funds of certain retirement systems. In doing so, the legislature also created an investment advisory committee to review the investment activities of the treasurer. The committee may, by majority vote, dispose of any investment, and, by unanimous vote, make a specific investment. Since express mention in a statute of one thing implies the exclusion of other similar things, *Sebewaing Industries, Inc v Village of Sebewaing*, 337 Mich 530; 60 NW2d 444 (1953), it is clear that the legislature did not intend to give the retirement boards a similar power to oversee investment activities.

It must also be concluded that the legislature, by enacting 1965 PA 380, § 91, *supra*, repealed by implication 1943 PA 240, § 8, *supra*, and 1945 PA 136, Ch I, § 8, *supra*, which, respectively, had given the State Employees' Retirement Board and the Public School Employees' Retirement Board the authority to invest the funds of their retirement system. The grant of investment powers by these prior acts is clearly repugnant to that provided in 1965 PA 380, § 91, *supra*. Likewise, the investment authority given to the State Administrative Board pursuant to 1954 PA 165, § 25, *supra*, for the Probate Judges' Retirement System has also been repealed by implication due to 1965 PA 380, § 91, as added by 1968 PA 45, *supra*.

As to the funds of the Judges' Retirement System, the legislature expressly repealed the State Administrative Board's power to invest such funds pursuant to 1951 PA 198, § 24(a); MCLA 38.824(a); MSA 27.125(24)(a). The section, as amended by 1970 PA 206, now provides in pertinent part:

“ . . . The power to invest funds of the system is vested in the investment committee provided in section 91 of Act No. 380 of the Public Acts of 1965, as added, being section 16.191 of the Compiled Laws of 1948. . . . ”

Thus, the sole power to invest the funds of the Judges' Retirement System has been vested in the investment advisory committee. 1965 PA 380, § 91, *supra*, had previously given the power to invest the same funds to the state treasurer. The statutes are inescapably repugnant. Therefore, to the extent of its grant of power to the state treasurer to invest the funds of the Judges' Retirement System, 1965 PA 380, § 91, *supra*, has been implicitly repealed by the legislature. *Locke v Macomb County*, *supra*; *Washtenaw County Road Commissioners v Public Service Commission*, *supra*.

Further, the retirement boards do not gain any measure of investment control from 1965 PA 314; MCLA 38.1121 *et seq*; MSA 3.981(101) *et seq*. OAG, 1965-1966, No 4496, p 288 (May 23, 1966) concluded that 1965 PA 314, *supra*, merely granted supplementary investment authority to the governmental entity already expressly charged with the investment duties for the funds of a retirement system.

No fiduciary relationship and, hence, no liability, exists when there has been no reposing of confidence and trust, and no reliance is placed upon the judgment of another. *Potter v Chamberlin, supra*. As shown above, the legislature has not vested these retirement boards with any authority to invest the funds of their respective retirement systems. Nor do they have any power to review the investment of those funds.

It is noted that 1965 PA 380, § 91, *supra*, requires the state treasurer to report all investment transactions for each of these retirement systems to their respective boards at least every 3 months. Those informational reports, of course, do not impose any sort of derivative liability on these retirement boards.

It is, therefore, my opinion that the State Employees' Retirement Board, *supra*, the Public School Employees' Retirement Board, *supra*, the Judges' Retirement Board, *supra*, and the Probate Judges' Retirement Board, *supra*, have no fiduciary financial obligation or liability with regard to the investment of funds of their respective retirement systems.

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**BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION:
Fingerprints.**

Board of Osteopathic Registration and Examination has authority to adopt a rule requiring that applicants for licensure and applicants for annual renewal of licensure be fingerprinted.

Opinion No. 4848

January 20, 1975.

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Board of Osteopathic Registration and Examination
1116 South Washington Avenue
Lansing, Michigan 48926

This is in response to your request for my opinion on the legality of requiring fingerprints of all applicants for licensure and applicants for annual renewal of licensure under the osteopathic act, 1903 PA 162; MCLA 338.101 *et seq*; MSA 14.571 *et seq*.

A review of the osteopathic statute, *supra*, fails to reflect specific statutory authorization for the Board of Osteopathic Registration and Examination, hereinafter referred to as "Board," to require licensees and applicants to submit to fingerprinting. A determination must therefore