June 28, 1995

OPINION NO. 95-014

Joseph Walter
Chairman, Board of Trustees
Police and Firemen's Disability and Pension Fund
230 East Town Street
Columbus, Ohio 43215-4650

Dear Chairman Walter:

Your predecessor requested an opinion concerning the authority of the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) to enter into a transaction with a fiduciary or party in interest. Your predecessor's specific questions are as follows:

1. Does section 742.112(B), Revised Code, provide an exception to the prohibitions set forth in section 742.112(A)?

2. Does 742.112(B) under appropriate circumstances, allow for transactions with "parties in interest"?

3. Do the provisions of section 742.11(B) that the board shall discharge its duties with respect to the fund "solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries..." conflict with the provisions of section 742.112(B)?

4. May the board rely upon the exception language contained in section 742.112(B), when considering and authorizing investments with fiduciaries or parties [in] interest?

Authority of the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF)

Pursuant to R.C. 742.02, the Police and Firemen's Disability and Pension Fund was created to provide disability benefits and pensions to members of the fund and their surviving spouses, children, and dependent parents. 1993 Op. Att'y Gen. No. 93-072 at 2-337. The fund is

administered, managed, and controlled by the Board of Trustees of PFDPF. R.C. 742.03(B); Op. No. 93-072 at 2-337; *see, e.g.,* R.C. 742.06-.07; R.C. 742.10-.11. In this regard, the Board of Trustees of PFDPF has only those powers and duties expressly provided by statute or necessarily implied thereby. *Dreger v. Public Employees Retirement Sys.,* 34 Ohio St. 3d 17, 20-21, 516 N.E.2d 214, 217 (1987); *State ex rel. Henderson v. Schuele,* 25 Ohio St. 2d 179, 182, 267 N.E.2d 590, 592 (1971); Op. No. 93-072 at 2-337.

The Board of Trustees of PFDPF is by statute the trustee of the various funds created by R.C. 742.38 and is given fiduciary responsibility with respect to those funds.[1] R.C. 742.11; R.C. 742.38; 1993 Op. Att'y Gen. No. 93-036 at 2-186 and 2-187. As trustee of these funds, the Board of Trustees is authorized to invest such funds in any bonds, notes, certificates of indebtedness, mortgage notes, real estate, stocks, shares, debentures, or other obligations, or securities described in R.C. 742.11(D). *See generally* 1980 Op. Att'y Gen. No. 80-090 at 2-350 (pursuant to R.C. 742.11, the Board of Trustees of PFDPF is "permitted to invest in specifically named obligations and _any other obligations_ of the United States government").

The authority of the Board of Trustees to invest the funds created by R.C. 742.38 in the securities or obligations listed in R.C. 742.11(D) is not unbridled, however. R.C. 742.111 and R.C. 742.112 set forth specific instances in which it is inappropriate for PFDPF to make an investment or engage in a transaction. R.C. 742.111 states:

> The police and firemen's disability and pension fund shall make no investments through or purchases from, or otherwise do any business with, any individual who is, or any partnership, association, or corporation that is owned or controlled by, a person who within the preceding three years was employed by, an officer of, or a board member of the fund, or in which a person who within the preceding three years was employed by, an officer of, or a board member of the fund, holds a fiduciary, administrative, supervisory or trust position, or any other position in which such person would be involved, on behalf of his employer, in decisions or recommendations affecting the investment policy of the fund, and in which such person would benefit by any monetary gain.

R.C. 742.112 further provides:

(A) Except as provided in division (B) of this section, a fiduciary[2] shall not cause

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[1] The Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) is the trustee of the policemen's contribution fund, firemen's contribution fund, policemen employers' contribution fund, firemen employers' contribution fund, policemen's pension reserve fund, firemen's pension reserve fund, guarantee fund, and expense fund. R.C. 742.38.

[2] R.C. 742.01(L) defines "[f]iduciary," as used in R.C. Chapter 742, to mean,

a person who does any of the following:

> the police and firemen's disability and pension fund to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect:
> (1) Sale or exchange, or leasing, of any property between the fund and a party in interest;
> (2) Lending of money or other extension of credit between the fund and a party in interest;
> (3) Furnishing of goods, services, or facilities between the fund and a party in interest;
> (4) Transfer to, or use by or for the benefit of a party in interest, of any assets of the fund; or
> (5) Acquisition, on behalf of the fund, of any employer security or employer real property.
> (B) Nothing in this section shall prohibit any transaction between the police and firemen's disability and pension fund and any fiduciary or party in interest if:
> (1) All the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest; and
> (2) The transaction is consistent with the fiduciary duties described in Chapter 742. of the Revised Code. (Footnote added.)

The Board of Trustees of PFDPF thus has the authority, pursuant to R.C. 742.11, to invest the funds created by R.C. 742.38 in the securities and obligations described in R.C. 742.11(D), subject to R.C. 742.111 and R.C. 742.112.[3]

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(1) Exercises any discretionary authority or control with respect to the management of the system, or with respect to the management or disposition of its assets;
(2) Renders investment advice for a fee, direct or indirect, with respect to money or property of the system;
(3) Has any discretionary authority or responsibility in the administration of the system.

Accordingly, the term "fiduciary" includes members of the Board of Trustees of PFDPF. *See, e.g.*, R.C. 742.03(B) (the administration, control, and management of PFDPF is vested in the Board of Trustees of PFDPF); R.C. 742.10 (the Board of Trustees of PFDPF may "adopt rules for the proper administration and management of the fund"); R.C. 742.11 (the Board of Trustees of PFDPF may invest the funds of PFDPF).

[3] In order to further safeguard the investment of funds by the Board of Trustees of PFDPF, R.C. 742.112 also sets forth provisions that regulate the conduct of fiduciaries with respect to transactions that concern PFDPF. R.C. 742.112 states, in pertinent part:

> (C) A fiduciary shall not:
> (1) Deal with the assets of the fund in his own interest or for his own account;
> (2) In his individual or in any other capacity, act in any transaction involving the fund on behalf of a party (or represent a party) whose interests are adverse to the

R.C. 742.112(B) Is an Exception to R.C. 742.112(A)

The first question asks whether R.C. 742.112(B) provides an exception to R.C. 742.112(A). As indicated above, except as provided in R.C. 742.112(B), R.C. 742.112(A) prohibits a fiduciary from inducing PFDPF to engage in certain specified transactions. Where the wording of a statute is clear and unambiguous, effect must be given to the statute as it is written. *Red Top Brewing Co. v. Peck*, 158 Ohio St. 259, 264, 109 N.E.2d 4, 7 (1952); *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944) (syllabus, paragraph five). By its very terms, R.C. 742.112(A) states that R.C. 742.112(B) is an exception to R.C. 742.112(A)'s provisions. The language of R.C. 742.112(A) thus clearly indicates a legislative intention to permit a fiduciary to induce PFDPF to engage in those transactions prohibited by R.C. 742.112(A) when the conditions set forth in R.C. 742.112(B) are satisfied. Accordingly, R.C. 742.112(B) constitutes an exception to R.C. 742.112(A).[4] *See generally State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442, 444 (1994) ("[t]he polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used and the purpose it sought to accomplish. Where the wording of a statute is clear and unambiguous, this court's only task is to give effect to the words used").

Subject to the Conditions Set Forth in R.C. 742.112(B), the Board of Trustees of

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interests of the fund or the interests of its participants or beneficiaries; or

(3) Receive any consideration for his own personal account from any party dealing with such fund in connection with a transaction involving the assets of the fund.

(D) In addition to any liability which he may have under any other provision, a fiduciary with respect to the fund shall be liable for a breach of fiduciary responsibility of any fiduciary with respect to the fund 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 Chapter 742. of the Revised Code, 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.

[4] "Ohio courts generally have endorsed the principle that a statutory exemption or exception shall be strictly construed whenever questions are raised regarding the likely scope of the exemption or exception at issue." 1994 Op. Att'y Gen. No. 94-075 at 2-376; *accord State ex rel. Keller v. Forney*, 108 Ohio St. 463, 467, 141 N.E. 16, 17 (1923). Accordingly, any question about the scope of the exception set forth in R.C. 742.112(B) is to be resolved in favor of limiting, narrowing, or otherwise restricting the exception's operation. This means that any doubt the Board of Trustees of PFDPF may have whether a particular transaction is permitted by R.C. 742.112(B) is to be resolved against the transaction.

PFDPF May Enter into a Transaction with a Party in Interest

The second question asks whether R.C. 742.112(B) authorizes the Board of Trustees of PFDPF to enter into a transaction with a party in interest. Pursuant to R.C. 742.112(B), the Board of Trustees of PFDPF is authorized to enter into a transaction with a party in interest if all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742. R.C. 742.112(B) thus unambiguously authorizes the Board of Trustees of PFDPF to enter into transactions with parties in interest if the conditions set forth therein are satisfied. Because unambiguous statutes are to be applied, not interpreted, it is reasonable to conclude that, pursuant to R.C. 742.112(B), the Board of Trustees of PFDPF has been granted the power to enter into a transaction with a party in interest, provided that all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest, and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742. *See generally Shover v. Cordis Corp.*, 61 Ohio St. 3d 213, 218, 574 N.E.2d 457, 461 (1991) ("it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly"), *reh'g denied*, 62 Ohio St. 3d 1410, 577 N.E.2d 362 (1991).

R.C. 742.11(B) Does Not Conflict with R.C. 742.112(B)

The third question asks whether the provisions of R.C. 742.11(B) that relate to the fiduciary responsibilities of the Board of Trustees of PFDPF conflict with R.C. 742.112(B). R.C. 742.11(B) states:

> The members of the board of trustees of the police and firemen's disability and pension fund shall be the trustees of the several funds created by section 742.38 of the Revised Code. The board and other fiduciaries shall discharge their duties with respect to the funds solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system; with 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 and with like aims; and by diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

R.C. 742.11(B) thus imposes various fiduciary duties on the Board of Trustees of PFDPF and other fiduciaries with respect to the funds created by R.C. 742.38.[5]

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[5] I note that R.C. 742.11(C) requires the Board of Trustees of PFDPF to consider investments that enhance the general welfare of the state and its citizens when exercising its fiduciary responsibilities

As stated above, R.C. 742.112(B) authorizes the Board of Trustees of PFDPF to enter into a transaction with a fiduciary or party in interest if all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742. Insofar as R.C. 742.11(B) sets forth provisions concerning the fiduciary duties of the Board of Trustees of PFDPF and other fiduciaries, it is reasonable to conclude that any transaction entered into between PFDPF and a fiduciary or party in interest pursuant to R.C. 742.112(B) must be consistent with, *inter alia*, the fiduciary duties set forth in R.C. 742.11(B). *See generally Ohio Bus Sales, Inc., v. Toledo Bd. of Educ.*, 82 Ohio App. 3d 1, 7, 610 N.E.2d 1164, 1168 (Lucas County 1992) ("[s]tatutes or sections of statutes which explicitly refer to each other are regarded as being *in pari materia*. It is the duty of the court to construe such statutes so that they are consistent and harmonious with a common policy and give effect to legislative intent" (citations omitted)); *King v. Cole*, 44 Ohio Law Abs. 60, 62 N.E.2d 650 (Franklin County 1945) (G.C. 486-17 (analogous in part to R.C. 124.34), providing that members of the police and fire departments of a city shall not be reduced in rank, laid off, or suspended except as provided in G.C. 486-17a (now R.C. 124.34), is *in pari materia* with G.C. 486-17a, and the two sections must be construed together). A review of R.C. 742.11(B) and R.C. 742.112(B) thus discloses no apparent inconsistency in the language of these two statutes.

Materials submitted in conjunction with your predecessor's request, however, state that it might be argued that R.C. 742.11(B) repeals by implication the provisions of R.C. 742.112(B). This argument would be supported by the contention that the fiduciary duties set forth in R.C. 742.11(B) prohibit the Board from entering into any transaction with a fiduciary or party in interest since any such transaction would not be prudent or solely in the interest of the participants and beneficiaries of the funds. Under this argument, the Board would never be permitted to enter into a transaction with a fiduciary or party in interest pursuant to R.C. 742.112(B), and the provisions of R.C. 742.112(B) authorizing such transactions would be rendered nugatory.

The problem with this argument is that it overlooks two fundamental rules of statutory construction. First, it is a long-standing rule of statutory construction that "repeals by implication

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with respect to the investment of the funds created by R.C. 742.38. In this regard, R.C. 742.11(C) provides as follows:

> In exercising its fiduciary responsibility with respect to the investment of the funds, it shall be the intent of the board to give consideration to investments that enhance the general welfare of the state and its citizens where such investments offer quality return and safety comparable to other investments currently available to the board. In fulfilling this intent, equal consideration shall be given to investments otherwise qualifying under this section that involve minority owned and controlled firms and firms owned and controlled by women either alone or in joint venture with other firms.

are not favored, and, where two affirmative statutes exist, one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation." *State v. Hollenbacher*, 101 Ohio St. 478, 483, 129 N.E. 702, 703 (1920); *accord State v. Ruppert*, 54 Ohio St. 2d 263, 268, 375 N.E.2d 1250, 1254 (1978), *cert. denied*, 439 U.S. 954 (1978); *State ex rel. City of Columbus v. Industrial Comm'n*, 158 Ohio St. 240, 243, 108 N.E.2d 317, 318 (1952). It is also equally "well settled that the General Assembly is presumed to act with knowledge of existing statutes." 1992 Op. Att'y Gen. No. 92-006 at 2-18. As stated in *Eggleston v. Harrison*, 61 Ohio St. 397, 404-05, 55 N.E. 993, 996 (1900):

> The presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject. Therefore acts upon the same subject are to be construed as a whole with reference to an entire system of which all are parts. The presumption being against indirect repeal, the courts will endeavor to harmonize the several parts, and where the statute has made no exception the courts will make none, nor where exceptions are made will they be carried further, in the absence of direct language, than the spirit of the law requires. An enlarged meaning, beyond the import of the words, will not be given to one act in order to repeal another by implication. It is not sufficient that the subsequent statute covers some of the cases provided for by the former; there must be positive repugnancy; and even then the old is repealed only to the extent of the repugnancy. If, by fair and reasonable interpretation, acts which are seemingly incompatible or contradictory may be enforced and made to operate in harmony, and without absurdity, both will be upheld, and the later one will not be regarded as repealing the former by construction or intendment. (Citations omitted.)

See Charles v. Fawley, 71 Ohio St. 50, 53, 72 N.E. 294, 295 (1904). Accordingly, two statutes relating to the same subject should be harmonized to the extent possible in order to give effect to both statutes. *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129, 1131 (1994); *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St. 3d 28, 35, 567 N.E.2d 1018, 1025 (1991); *see also* R.C. 1.47 (in enacting a statute, it is presumed that the General Assembly intended a result feasible of execution).

Applying the principles of statutory construction set forth above, it must be assumed that the General Assembly was aware of R.C. 742.11(B) when it enacted R.C. 742.112(B). *See generally* 1981-1982 Ohio Laws, Part I, 1776, 1798-811 (Am. Sub. H.B. 113, eff. Nov. 5, 1981) (enacting R.C. 742.112(B) and amending R.C. 742.11 to include the fiduciary duties of the Board of PFDPF and other fiduciaries with respect to the investment of the funds created by R.C. 742.38). Moreover, R.C. 742.11(B) must not be construed in a way that would abrogate, defeat, or nullify R.C. 742.112(B), where a reasonable construction that gives effect to both provisions is possible. *See County of San Diego v. Elavsky*, 58 Ohio St. 2d 81, 86, 388 N.E.2d 1229, 1233 (1979); *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*, 4 Ohio App. 2d 4, 6, 211 N.E.2d 57, 59 (Hamilton County 1964).

As noted previously, a review of R.C. 742.11(B) and R.C. 742.112(B) discloses no apparent inconsistency in the language of these two statutes. Rather, it is possible to construe R.C. 742.11(B)

in a way that gives effect to the language of R.C. 742.112(B). The language of R.C. 742.11(B) requires the Board and other fiduciaries to "discharge their duties with respect to the funds solely in the interest of the participants and beneficiaries." The plain language of this statute thus mandates that the Board and other fiduciaries consider only the interests of the participants and beneficiaries of the funds when discharging their duties with respect to the funds created by R.C. 742.38. The statute does not prohibit fiduciaries or parties in interest from having an interest in a transaction of the Board. It does, however, prohibit the Board or other fiduciaries from considering the interests of any fiduciary or party in interest when entering into transactions on behalf of PFDPF. *Cf. Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986) ("[t]he fiduciary must discharge his obligations solely in the interests of the participants and beneficiaries. Thus, when a fiduciary's actions that are taken in connection with the performance of his duties as trustee or administrator are in his own interest as well, we rigorously scrutinize the conduct" (citations omitted)); *Newton v. Van Otterloo*, 756 F. Supp. 1121, 1128 (N.D. Ind. 1991) ("ERISA, however, forbids a fiduciary to consider his own interests in making decisions respecting the assets of an ERISA plan; the fiduciary's decisions _must be made with an eye single to the interests of the participants and beneficiaries_" (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982))); *In re Sedgwick's Will*, 74 Ohio App. 444, 461, 59 N.E.2d 616, 624 (Belmont County 1944) (trustee is under a duty to administer a trust solely in the interest of the beneficiaries and is not to be guided by the interest of any third person).

Reading R.C. 742.11(B) and R.C. 742.112(B) together thus indicates that the General Assembly intended to authorize the Board to enter into a transaction with a fiduciary or party in interest when the Board and other fiduciaries determine that such a transaction is in the best interests of the participants and beneficiaries of the funds, provided that all aspects of the transaction satisfy the conditions set forth in R.C. 742.112(B). If the Board and other fiduciaries determine that a transaction between the Board and a fiduciary or party in interest is in the best interests of the participants and beneficiaries of the funds, it is irrelevant that the fiduciary or party in interest derives a benefit from the transaction. It is no violation of R.C. 742.11(B) for the Board to enter into a transaction with a fiduciary or party in interest that reasonably promotes the interests of the participants and beneficiaries of the funds simply because that transaction also benefits a fiduciary or party in interest. *See generally United Steelworkers of America v. Cyclops Corp.*, 860 F.2d 189, 200-01 (6th Cir. 1988) (considering the scope of the language of 29 U.S.C. § 1104(a)(1)(A)(i), which states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries," and concluding that decisions regarding pension plans that also serve the interest of the corporation funding the plan are not, for that reason alone, breaches of fiduciary duty); *Holliday v. Xerox Corp.*, 732 F.2d 548, 551-52 (6th Cir. 1984) ("[a]s the legislative history makes clear, ERISA recognizes the inherent tension between the desire that employees retire with adequate retirement income and the practical internal pressures exerted on the trustees charged with preserving the assets of the pension fund. While ERISA resolves this conflict resoundingly on the side of the employees, Congress did not intend the Act to penalize employers for exercising their discretion to make rational economic decisions which are both in the best interests of the preservation of the fund and which are also not adverse to the employer's interests"), *cert. denied*, 469 U.S. 917 (1984); *Morse v. Stanley*, 732 F.2d 1139, 1146 (2d Cir. 1984) ("[i]t is no violation of a

trustee's fiduciary duties to take a course of action which reasonably best promotes the interest of plan participants simply because it incidentally also benefits the corporation"); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) ("officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves"), *cert. denied*, 459 U.S. 1069 (1982). A violation of R.C. 742.11(B) occurs when the Board and other fiduciaries consider the interests of the fiduciary or party in interest when contemplating the merits of such transactions. It is thus clear that the language of R.C. 742.11(B) requiring the Board and other fiduciaries to "discharge their duties with respect to the funds solely in the interest of the participants and beneficiaries" does not support the argument that R.C. 742.11(B) repeals by implication the provisions of R.C. 742.112(B).

I turn now to the contention that the provision in R.C. 742.11(B) requiring the Board and other fiduciaries to discharge their duties with respect to the funds created by R.C. 742.38 "with 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 and with like aims" prohibits the Board from entering into a transaction with a fiduciary or party in interest pursuant to R.C. 742.112(B) because such transaction is not prudent. This contention is based on the proposition that fiduciaries of PFDPF must refrain from creating situations in which their own interests are brought into conflict with those of the trust, and from doing those things that would prevent them from discharging objectively and in a completely disinterested fashion their fiduciary duties with respect to the funds created by R.C. 742.38. *See Cleveland Clinic Found. v. Humphrys*, 97 F.2d 849, 856 (6th Cir. 1938), *cert. denied*, 305 U.S. 628 (1938); *In re Trusteeship of Stone*, 138 Ohio St. 293, 34 N.E.2d 755 (1941); *Muth v. Maxton*, 68 Ohio Law Abs. 164, 170, 119 N.E.2d 162, 167 (1954); *Manchester v. Cleveland Trust Co.*, 95 Ohio App. 201, 210-11, 114 N.E.2d 242, 248 (1953). *See generally* R.C. 2109.44 ("[f]iduciaries shall not buy from or sell to themselves nor shall they in their individual capacities have any dealings with the estate, except as expressly authorized by the instrument creating the trust and then only to the extent expressly permitted by section 1109.10 or 1109.20 of the Revised Code or with the approval of the probate court in each instance").

Although R.C. 742.11(B), as a general matter, prohibits the Board and other fiduciaries from self-dealing, the General Assembly by enacting R.C. 742.112(B) has expressly identified instances in which PFDPF may enter into a transaction with a fiduciary or party in interest. As noted above, the General Assembly was aware of the fiduciary duties imposed upon the Board and other fiduciaries by R.C. 742.11 when it enacted R.C. 742.112(B). *See* 1981-1982 Ohio Laws, Part I, 1776, 1798-811 (Am. Sub. H.B. 113, eff. Nov. 5, 1981). It is thus clear that the General Assembly determined that the requirement of prudence could be met by a transaction that satisfies the conditions set forth in R.C. 742.112(B). *See generally Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 580 (11th Cir. 1987) ("[t]he [t]rustees can act on behalf of both parties until a situation arises which requires action in the interest of a party other than, and in conflict with the interests of, the plan beneficiaries. Thus, the statutorily imposed fiduciary duty to act solely in the interest of the participants and beneficiaries under ERISA requires trustees who are also officers or

agents of a corporation or a union to act with caution in areas of potential conflicts of interest"), *cert. denied*, 484 U.S. 1005 (1988); *Withers v. Teachers' Retirement Sys. of New York*, 447 F. Supp. 1248, 1256 (S.D. N.Y. 1978) (although city comptroller's interest conflicted with pension plan's interests, he was not incapable of acting as a trustee, but he has "_an especial obligation to act fairly on behalf of those concerned with the results of the action taken_" (quoting *Westchester Chapter, Civil Serv. Employees Ass'n v. Levitt*, 37 N.Y.2d 519, 521, 337 N.E.2d 748, 749 (1975))), *aff'd mem.*, 595 F.2d 1210 (2d Cir. 1979).

Moreover, it is a codified rule of statutory construction that a special provision prevails over a general provision. In this regard, R.C. 1.51 states:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

R.C. 742.112(B) is a special provision in relation to R.C. 742.11(B) because R.C. 742.112(B) permits conduct that R.C. 742.11(B) prohibits by implication. There also is no manifest intent that R.C. 742.11(B) prevail over R.C. 742.112(B). Even if the provisions of R.C. 742.11(B) and R.C. 742.112(B) were found to be irreconcilable, R.C. 1.51 would require that R.C. 742.112(B) prevail as an exception to R.C. 742.11(B). Therefore, 742.11(B), requiring the Board and other fiduciaries to "discharge their duties with respect to the funds ... with 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 and with like aims," does not support the argument that R.C. 742.11(B) repeals by implication the provisions of R.C. 742.112(B).

In light of the foregoing, it is clear that there is no irreconcilable conflict between R.C. 742.11(B) and R.C. 742.112(B), and that it is possible to read and give effect to the provisions of both statutes. Accordingly, I conclude that the provisions of R.C. 742.11(B) relating to the fiduciary responsibilities of the Board and other fiduciaries do not conflict with R.C. 742.112(B).

The Board of Trustees of PFDPF May Rely Upon R.C. 742.112(B) When Considering and Authorizing Investments with Fiduciaries or Parties in Interest

The final question asks whether the Board may rely on R.C. 742.112(B) when considering and authorizing investments with fiduciaries and parties in interest. The plain language of R.C. 742.112(B) indicates a legislative intent to permit the Board to enter into a transaction with a fiduciary or party in interest when all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest, and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742. Whether the Board may enter into a particular transaction under R.C. 742.112(B) thus involves determinations of fact, which the Board must make before

entering into the transaction. *See, e.g.,* 1994 Op. Att'y Gen. No. 94-048 at 2-241 ("[w]hether a particular investment is appropriate depends upon a careful analysis of all relevant factors"); 1993 Op. Att'y Gen. No. 93-054 at 2-259 (the appropriateness of any particular investment in participating mortgage-backed securities depends upon a careful analysis of all relevant factors); 1989 Op. Att'y Gen. No. 89-033 at 2-153 (whether a decision by the Industrial Commission to approve the sale of properties at the lower market value price is reasonable and prudent depends upon the factual circumstances that prevail at the time the proposed sale is consummated).

Accordingly, before entering into a transaction with a fiduciary or party in interest, the Board and other fiduciaries must conduct a careful and impartial investigation of all the relevant factual circumstances at the time of the transaction to ensure that such transaction corresponds to a transaction between similar parties who are not parties in interest, is consistent with the fiduciary duties described in R.C. Chapter 742, and is in the best interests of the participants and beneficiaries of the funds created by R.C. 742.38.[6] *See Schaefer v. Arkansas Medical Soc.,* 853 F.2d 1487, 1492 (8th Cir. 1988) ("[w]hen a fiduciary has dual loyalties, ... the prudent person standard requires that he make a careful and impartial investigation of all investment decisions. Although Schaefer is not charged with making an improper investment decision, _[a] review of a fiduciary's independent investigation is one of the well-established yardsticks against which courts have customarily tested fiduciary conduct for prudence_" (quoting *Donovan v. Bierwirth,* 538 F. Supp. 463, 470 (E.D. N.Y. 1981), *modified,* 680 F.2d 263 (2d Cir. 1982), *cert. denied,* 459 U.S. 1069 (1982)) (citations omitted)); *Leigh v. Engle,* 727 F.2d 113, 125-26 (7th Cir. 1984) ("[w]here it might be possible to question the fiduciaries' loyalty, they are obliged at a minimum to engage in an intensive and scrupulous independent investigation of their options to insure that they act in the best interests of the plan beneficiaries"); *see also Lanka v. O'Higgins,* 810 F. Supp. 379, 387 (N.D. N.Y. 1992) ("[t]he prudent person standard has been determined by the courts to be an objective standard, requiring the fiduciary to (1) employ proper methods to investigate, evaluate and structure the investment; (2) act in a manner as would others who have a capacity and familiarity with such matters; and (3) exercise independent judgment when making investment decisions. This standard requires that the fiduciary's behavior be measured as against the standards in the investment

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[6] In discharging its duty to inquire into the propriety of a transaction between the Board and a fiduciary or party in interest under R.C. 742.112(B), it is recommended that the Board have the transaction reviewed by disinterested financial advisers and legal counsel. *See generally Donovan v. Bierwirth,* 680 F.2d 263, 272-73 (2d Cir. 1982) ("Bierwirth and Freese should have been immediately aware of the difficult position which they occupied as a result of having decided as directors some of the same questions they would have to decide as trustees, and should have explored where their duty lay.... One way for the trustees to inform themselves would have been to solicit the advice of independent counsel.... We do not mean by this either that trustees confronted with a difficult decision need always engage independent counsel or that engaging such counsel and following their advice will operate as a complete whitewash which, without more, satisfies ERISA's prudence requirement. But this was, and should have been perceived to be, an unusual situation peculiarly requiring legal advice from someone above the battle" (footnote omitted)), *cert. denied,* 459 U.S. 1069 (1982).

industry" (citations omitted)). If, after conducting an intensive and independent investigation of a transaction between the Board and a fiduciary or party in interest, the Board and other fiduciaries determine that the transaction corresponds to a transaction between similar parties who are not parties in interest, is consistent with the fiduciary duties described in R.C. Chapter 742, and is in the best interests of the participants and beneficiaries of the funds created by R.C. 742.38, the Board may rely upon R.C. 742.112(B) and enter into the transaction.

Conclusion

Based on the foregoing, it is my opinion and you are hereby advised as follows:

1.R.C. 742.112(B) authorizes the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) to enter into a transaction with a fiduciary or party in interest, and thus is an exception to the provisions of R.C. 742.112(A) that prohibit a fiduciary from causing PFDPF to engage in certain specified transactions with a party in interest.

2.Pursuant to R.C. 742.112(B), the Board of Trustees of PFDPF is authorized to enter into a transaction with a party in interest, provided that all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest, and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742.

3.The provisions of R.C. 742.11(B) relating to the fiduciary responsibilities of the Board of Trustees of PFDPF and other fiduciaries do not conflict with R.C. 742.112(B).

4.If, after conducting an intensive and scrupulously impartial investigation of a transaction between the Board of Trustees of PFDPF and a fiduciary or party in interest, the Board and other fiduciaries determine that the transaction corresponds to a transaction between similar parties who are not parties in interest, is consistent with the fiduciary duties described in R.C. Chapter 742, and is in the best interests of the participants and beneficiaries of the funds created by R.C. 742.38, the Board may rely upon R.C. 742.112(B) and enter into the transaction.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

June 28, 1995

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SYLLABUS: 95-014

1. R.C. 742.112(B) authorizes the Board of Trustees of the Police and Firemen's Disability and Pension Fund (PFDPF) to enter into a transaction with a fiduciary or party in interest, and thus is an exception to the provisions of R.C. 742.112(A) that prohibit a fiduciary from causing PFDPF to engage in certain specified transactions with a party in interest.

2. Pursuant to R.C. 742.112(B), the Board of Trustees of PFDPF is authorized to enter into a transaction with a party in interest, provided that all the terms and conditions of the transaction are comparable to the terms and conditions which might reasonably be expected in a similar transaction between similar parties who are not parties in interest, and the transaction is consistent with the fiduciary duties described in R.C. Chapter 742.

3. The provisions of R.C. 742.11(B) relating to the fiduciary responsibilities of the Board of Trustees of PFDPF and other fiduciaries do not conflict with R.C. 742.112(B).

4. If, after conducting an intensive and scrupulously impartial investigation of a transaction between the Board of Trustees of PFDPF and a fiduciary or party in interest, the Board and other fiduciaries determine that the transaction corresponds to a transaction between similar parties who are not parties in interest, is consistent with the fiduciary duties described in R.C. Chapter 742, and is in the best interests of the participants and beneficiaries of the funds created by R.C. 742.38, the Board may rely upon R.C. 742.112(B) and enter into the transaction.