

OPINION NO. 89-033**Syllabus:**

1. Pursuant to R.C. 4123.442(F), the Bureau of Workers' Compensation, with the approval of the Industrial Commission of Ohio, may enter into an agreement with the Ohio Building Authority for the sale thereto of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center. In accordance with Ohio Const. art. VIII, §21 and R.C. 152.09(B), the Ohio Building Authority may issue revenue obligations for the purpose of financing its acquisition of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, provided the General Assembly, as directed by R.C. 152.09(F), appropriates lease payments or other moneys for such rehabilitation centers, or by other act authorizes such acquisition.
2. Pursuant to R.C. 152.06(A), the Bureau of Workers' Compensation, with the approval of the Industrial Commission of Ohio, may enter into an agreement with the Ohio Building Authority for the conveyance thereto of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center when necessary or convenient to carry out the statutory purposes of the Ohio Building Authority. In accordance with Ohio Const. art. VIII, §21 and R.C. 152.09(B), the Ohio Building Authority may issue revenue obligations for the purpose of financing its acquisition of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, provided the General Assembly, as directed by R.C. 152.09(F), appropriates lease payments or other moneys for such rehabilitation centers, or by other act authorizes such acquisition.
3. R.C. Chapter 4123 confers upon the Industrial Commission of Ohio a fiduciary responsibility to preserve and safeguard the financial integrity and soundness of the state insurance fund that has been created pursuant to Ohio Const. art. II, §35 and R.C. 4123.30. Such a responsibility on the part of the Industrial Commission includes an obligation to adhere to certain standards of judgment and care when making decisions or taking actions that may affect the financial integrity and soundness of the state insurance fund, including any decisions or actions that pertain or relate to the Industrial Commission's approval of the Bureau of Workers' Compensation's exercise of the investment powers conferred upon it by R.C. Chapter 4123, as set forth in R.C. 4123.44-442. Approval by the Industrial Commission of all investment actions and decisions of the Bureau of Workers' Compensation under R.C. 4123.44-442 shall be guided by the same standards of care and judgment as would be followed by a reasonable and prudent investor in the same or similar circumstances.
4. Whether a sale of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center to the Ohio Building Authority for a price that is less than the total amount of costs actually incurred in their construction and development represents a reasonable and prudent investment decision on the part of the Bureau of Workers' Compensation and

the Industrial Commission of Ohio will depend upon the factual circumstances that prevail at the time such a sale is consummated.

5. The Bureau of Workers' Compensation and the Industrial Commission of Ohio may agree to modify or renegotiate the terms of the present agreement that governs the Bureau's lease of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center to the Industrial Commission, provided there is no provision within that agreement that prohibits or otherwise restricts such a modification or renegotiation.
6. A decision by the Industrial Commission of Ohio to agree to a reduction in the amount of rent it pays the Bureau of Workers' Compensation under the terms of the present agreement that governs the Bureau's lease of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center shall be guided by the same standards of care and judgment as would be followed by a reasonable and prudent investor in the same or similar circumstances. The factual circumstances that prevail at the time such decision is made and implemented will determine whether a rent reduction that yields a rate of return less than the average rate of return on the state insurance fund's fixed-income investments is the product of a reasonable and prudent investment decision.

To: Warren J. Smith, Chairman, Industrial Commission of Ohio, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 16, 1989

You have requested my opinion regarding the authority of the Industrial Commission of Ohio and the Bureau of Workers' Compensation to enter into agreements with the Ohio Building Authority (OBA) for the purchase of two rehabilitation centers that presently are controlled and managed by the Industrial Commission and the Bureau. Your letter provides the following explanatory background information:

The W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center have been completed and are in operation. The cost of the construction of the facilities was made from expenditures of monies from the State Insurance Fund as an investment in productive real estate under Section 4123.442(F)¹ of

¹ R.C. 4123.34 states, in pertinent part, that ten percent of the money paid into the state insurance fund, *see* R.C. 4123.30,

shall be set aside for the creation of a surplus until such surplus shall amount to the sum of one hundred thousand dollars, after which time, whenever necessary in the judgment of the commission to guarantee a solvent state insurance fund, a sum not exceeding five per cent of all the money paid into the state insurance fund shall be credited to such surplus fund.

R.C. 4123.34(B). R.C. 4123.44-.442 in turn describe the investment authority of the Administrator of the Bureau of Workers' Compensation with respect to moneys in such surplus fund. In particular, R.C. 4123.442(F), to which you have referred, reads as follows:

In addition to investments authorized by section 4123.44 of the Revised Code, the administrator of the bureau of workers' compensation may invest any of the surplus or reserve

the Ohio Revised Code. The Industrial Commission operates the facilities as rehabilitation centers and leases the facilities from the Bureau of Workers' Compensation. The rental cost is made payable to the Bureau of Workers' Compensation and is charged as an administrative cost of the Industrial Commission under Section 4123.341² of the Ohio Revised Code. The rental charges paid by the Industrial Commission to the Bureau of Workers' Compensation are periodically adjusted to match the average rate of return on fixed-income investments of the State Insurance Fund. It is assumed that it would be necessary for the General Assembly to enact specific legislative authority for the Commission to enter into the proposed leasing arrangement.

However, it is our understanding that should the Ohio Building Authority issue obligations to provide funds to acquire the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, that the Administrator of the Bureau of Workers' Compensation would receive the proceeds of the sale of the issued obligations for deposit into the State Insurance Fund for investment under the provisions of the Ohio Workers' Compensation Act, as amended. Instead of the current leasing arrangement between the Industrial Commission and the Bureau of Workers' Compensation, the Industrial Commission, as the using state agency, would lease the two rehabilitation facilities from the Ohio Building Authority.

Under the arrangement set forth in the preceding paragraph, it is anticipated that the rental charges paid by the Industrial Commission to the Ohio Building Authority would be substantially less than the rental charges currently paid by the Industrial Commission to the Bureau of Workers' Compensation. The administrative cost incurred by the Industrial Commission in operating the two state rehabilitation centers would be reduced. Therefore, it follows that the Industrial Commission, upon recommendation of the Bureau of Workers' Compensation, would allocate among the various employer groups listed in Section 4123.342 of the Revised Code an adjustment in assessments caused by the reduction in administrative costs of the Industrial Commission. The method of allocation of the adjusted amounts would be based upon the fair share of administrative costs of

belonging to the state insurance fund in the following obligations:

....
 Productive real estate within the state provided that the value of such real estate does not exceed ten per cent of the total value of all its investments and that such property shall be subject to all real property taxes levied under the laws of the state unless such property is used exclusively for public purposes. Such productive real estate shall be used for a public purpose, and may include a building or buildings to house the activities of the industrial commission, bureau of workers' compensation, and such other state public purposes as may be feasible and desirable. Investment in productive real estate may include entering into agreements with the Ohio building authority for the construction of office buildings and related facilities for the use of state agencies, municipal corporations, and counties as provided in sections 152.19 and 152.26 of the Revised Code.

² R.C. 4123.341 declares that the administrative costs of the Industrial Commission and the Bureau of Workers' Compensation "shall be those costs and expenses which are incident to the discharge of the duties and performance of the activities of the" Industrial Commission and the Bureau under R.C. Chapters 4121 and 4123. The allocation of those costs on a ratable basis among the state, its instrumentalities, counties, taxing districts, and private employers is further addressed in R.C. 4123.342.

the two state rehabilitation centers attributable to the various employer groups listed in Section 4123.342 of the Revised Code.

As an alternative to the aforementioned proposal, the Industrial Commission is considering re-negotiating the rental costs charged by the Administrator of the Bureau of Workers' Compensation on behalf of the State Insurance Fund. The initial discussions have led to an inquiry as to whether the rental costs can be fixed at a level below that of the average rate of return from the investment portfolio of the State Insurance Fund. (Footnotes added.)

With respect to the foregoing situation, you have asked that I address the following specific questions:

1. Does the Administrator of the Bureau of Workers' Compensation with the approval of the Industrial Commission have the authority to enter into agreements with the Ohio Building Authority whereby the Ohio Building Authority would acquire the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center and thereafter the Administrator of the Bureau of Workers' Compensation would receive the proceeds of the sale of obligations issued by the Ohio Building Authority to acquire the two rehabilitation centers, for deposit into the State Insurance Fund for investment under the provisions of the Ohio Workers' Compensation Act?
2. If the answer to the preceding question is in the affirmative, would the Industrial Commission breach any fiduciary responsibility to the State Insurance Fund, should the market value or the cost of Ohio Building Authority's acquiring the two state rehabilitation centers be less than the original cost of the two state rehabilitation centers established in the Productive Real Estate Account of the State Insurance Fund, resulting in a reduction in investment income of the State Insurance Fund to the detriment of contributors to the State Insurance Fund?
3. Is there authority for the Industrial Commission and the Bureau of Workers' Compensation to re-negotiate the lease as to the rental charges of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center whereby such rental charges are fixed at a rate that is less than the average rate of return on fixed-income investments of the State Insurance Fund?

In your first question you have asked whether the Administrator of the Bureau of Workers' Compensation, with the approval of the Industrial Commission of Ohio, is authorized to enter into agreements with the Ohio Building Authority for the acquisition thereby of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center. Pursuant to article II, §35³ of

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- 3 Article II, §35 of the Ohio Constitution states, in part, the following:

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages

the Ohio Constitution, the Industrial Commission of Ohio and the Bureau of Workers' Compensation have been established by the General Assembly for the purpose, *inter alia*, of administering and enforcing those provisions of the Revised Code that, in accordance with foregoing constitutional directive, address the compensation and vocational rehabilitation of individuals who have suffered death, injury, or disease in connection with their employment. See R.C. 4121.02; R.C. 4121.12; R.C. 4121.121; R.C. 4121.13; R.C. 4121.131. Thus, as creatures of statute, the Industrial Commission and the Administrator of the Bureau of Workers' Compensation may exercise only those powers and responsibilities that are expressly conferred upon them by statute, or that are necessarily implied by those that have been expressly granted. *State ex rel. Funtash v. Industrial Commission*, 154 Ohio St. 497, 499, 96 N.E.2d 593, 594 (1951) ("[i]t should be remembered that the Industrial Commission is an administrative agency possessing only such powers and duties as are conferred on it by the provisions of the Constitution and statutes of Ohio"). See generally *State ex rel. Alden E. Stilson & Associates, Ltd. v. Ferguson*, 154 Ohio St. 139, 93 N.E.2d 688 (1950); *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923); 1977 Op. Att'y Gen. No. 77-090; 1973 Op. Att'y Gen. No. 73-088. Accordingly, whether the Administrator of the Bureau of Workers' Compensation may, with the approval of the Industrial Commission, enter into an agreement with OBA for the acquisition of the rehabilitation centers in question will depend upon the extent to which existing provisions of the Revised Code grant such authority to the Administrator and the Industrial Commission.

The duties, powers, and responsibilities conferred upon the Industrial Commission and the Bureau of Workers' Compensation are set forth primarily in the various provisions that appear throughout R.C. Chapters 4121 (Industrial Commission) and 4123 (workers' compensation). For the most part, those provisions address the numerous responsibilities of the Industrial Commission and the Bureau with regard to the processing and payment of workers' compensation claims, the administration and management of the state insurance fund, and the rehabilitation of injured workers. R.C. 4121.12, R.C. 4121.121, and R.C. 4121.39 furnish, in fairly general terms, a summation of those duties and powers in the case of the Bureau and its Administrator, and R.C. 4121.13 and R.C. 4121.131 provide a similar summation with respect to the Industrial Commission. R.C. 4121.12 provides that the Administrator of the Bureau shall be a person who possesses "a recognized expertise in the field of workers' compensation," and R.C. 4121.121 confers upon the Administrator overall responsibility for "management of the bureau and for the discharge of all administrative duties imposed upon the industrial commission in [R.C. Chapter 4123]." Regarding the Administrator's exercise of powers of which the Industrial Commission is also possessed, R.C. 4121.121(A) states, in pertinent part, as follows:

The administrator shall do all acts and exercise all authorities and powers, discretionary and otherwise, which are required of or vested in the commission or any of its employees or subordinates in Chapter 4123. of the Revised Code, except such acts and such exercise of authority and power as is required of and vested in the commission in Chapters 4121. and 4123. of the Revised Code. This grant to the administrator of authorities and powers vested in the commission shall not divest the commission of the right to exercise such authorities and powers in the discharge of its own responsibilities, and any authority or power which is vested in the commission or the administrator in Chapter 4123. of the Revised Code may be exercised by either to the extent necessary to effect the discharge of their respective responsibilities.

at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto.

R.C. 4121.121 further provides that the Administrator shall employ, direct, and supervise all deputies and other employees required in connection with the performance of the Bureau's duties, R.C. 4121.121(B); reorganize the work of the Bureau, its sections, departments, and offices to the extent necessary to achieve the most efficient performance of the Bureau's functions, R.C. 4121.121(C); provide offices, equipment, supplies, and other facilities for the Bureau, and, in addition, suitable office space in the district offices for the district hearing officers, the staff hearing officers, the regional boards of review, and their employees, as requested by the Industrial Commission, R.C. 4121.121(D); prepare and submit to the Industrial Commission information pertaining to classifications of occupations, or industries, premium rates and contributions, amounts to be credited to the surplus fund, rules and systems of rating, rate revisions, and merit rating, R.C. 4121.121(E); keep the accounts of moneys paid into the state insurance fund, pursuant to R.C. 4123.34(A), and all other accounts and records necessary to the collection, administration, and distribution of the workers' compensation funds, R.C. 4121.121(F); exercise the investment powers vested in the Industrial Commission by R.C. 4123.44, subject to the Commission's approval, R.C. 4121.121(G); prepare and submit to the Director of Budget and Management a budget for each biennium for inclusion in the budget document submitted by the Governor to the General Assembly, R.C. 4121.121(J); decentralize and relocate such of the personnel and activities of the Bureau as is practicable in an effort to promote prompt and efficient administration in the processing of claims, R.C. 4121.121(K); and set standards for the reasonable and maximum handling time of claims payment functions and ensure the impartial and prompt treatment of all claims and employer risk accounts, R.C. 4121.121(M). *See also* R.C. 4121.121(I) ("[t]he acts of the administrator or of one or more of his deputies within the scope of the authority conferred upon them by the administrator and the acts of a regional board of review are acts of the commission unless modified or set aside under chapter 4123. of the Revised Code").

Finally, R.C. 4121.39 enumerates additional general responsibilities of the Administrator of the Bureau regarding the processing and payment of workers' compensation claims. Thus, the statute provides that the Administrator shall review and process all initial applications for claims, R.C. 4121.39(A)(1); award compensation and make payment on all noncontested claims if the Bureau holds the claim qualified under Industrial Commission policy guidelines and the pertinent statutes, R.C. 4121.39(A)(2); make payment on all orders of the Industrial Commission, a regional board, and district or staff hearing officers, R.C. 4121.39(A)(3); and serve as representative of the state insurance fund, R.C. 4121.39(A)(4). The Administrator is further directed to establish a legal section within the Bureau to provide legal advice and assistance to the Bureau and its staff, R.C. 4121.39(B), and a quality control section to provide quality control, systems design, and internal auditing functions, R.C. 4121.39(C).

A general summary of the powers and duties similarly granted the Industrial Commission appears in R.C. 4121.13 and R.C. 4121.131. R.C. 4121.13(A)-(C) empower the Industrial Commission to engage in the activities enumerated therein for the purpose of ensuring that all places of employment present a safe and well-maintained working environment, and do not pose a threat to the health and welfare of individual employees. R.C. 4121.13 further directs the Industrial Commission to investigate, ascertain, and determine such reasonable classifications of persons, employments, and places of employment as are necessary to carry out the applicable terms of R.C. 4101.01-.16 and R.C. 4121.01-.29, R.C. 4121.13(D); adopt reasonable and proper rules relative to the exercise of the Commission's powers and authorities, and rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings, R.C. 4121.13(E); investigate all cases of fraud or other illegalities pertaining to the operation of the workers' compensation system and its several insurance funds, R.C. 4121.13(F); and do all things convenient and necessary to accomplish the purposes directed in R.C. 4101.01-.16 and R.C. 4121.01-.28, R.C. 4121.13(G).

Finally, R.C. 4121.131 describes a variety of powers and responsibilities bestowed upon the Industrial Commission in addition to those listed in R.C. 4121.13, stating as follows:

The industrial commission, in addition to the specific powers, authority, and duties vested in and imposed upon it by section 4121.13

of the Revised Code, shall classify occupations or industries as provided in sections 4123.29 and 4123.31 of the Revised Code, fix rates and determine contributions as provided in sections 4123.34 and 4123.38 of the Revised Code, determine amounts to be credited to the surplus fund as provided in section 4123.34 of the Revised Code, allocate administrative costs as provided in section 4123.342 of the Revised Code, adopt rules, and systems of rating, rate revision, and merit rating as provided in sections 4123.32 and 4123.34 of the Revised Code, cause audits of the funds as provided in section 4123.47 of the Revised Code, grant and revoke the privilege of self-insurance as provided in section 4123.35 of the Revised Code, commute payments of compensation and determine applications for final settlements as provided in sections 4123.64 and 4123.65 of the Revised Code, determine claims for additional award under Section 35 of Article II of the Ohio Constitution, exercise the powers and authorities in section 4121.37 of the Revised Code, make settlements of the liability of employers who are not in compliance with Chapter 4123. of the Revised Code, and render final determinations of disputed claims as provided in section 4123.516, 4123.517, and 4123.518 of the Revised Code, except as provided in section 4123.519 of the Revised Code.

The remaining provisions in R.C. Chapters 4121 and 4123 set forth in greater detail the specific activities and functions that the Bureau and the Industrial Commission shall undertake in effecting the duties and responsibilities conferred upon them by the foregoing statutes. Those provisions, for example, address the procedures that govern investigations and hearings by the Industrial Commission, and the Commission's jurisdiction with respect to contested workers' compensation claims, R.C. 4121.14-.29; R.C. 4123.511-.53; the conduct of claims proceedings before the Bureau, R.C. 4121.30-.44; R.C. 4123.05-.14; programs for the rehabilitation of injured workers, R.C. 4121.61-.69; maintenance of reports, records, and statistics relevant to the work of the Bureau and the Industrial Commission, R.C. 4123.19-.28; calculation, assessment, and collection of employer contributions to the state insurance fund and accounts related thereto, R.C. 4123.29-.419; investment of reserve moneys of the state insurance fund, R.C. 4123.44-.442; and calculation and payment of benefits from the state insurance fund to injured workers who have demonstrated their entitlement to the receipt of such benefits, R.C. 4123.54-.70.

It is clear that an express grant of authority on the part of the Bureau and the Industrial Commission to divest themselves of real property, and improvements thereto, over which they exercise managerial responsibility and control does not appear in any of the aforementioned statutory provisions of R.C. Chapter 4121 or R.C. Chapter 4123. Thus, any authority they may possess and exercise in that regard must be conferred by implication.

With respect to the particular situation described in your letter, I am of the opinion that such authority may reasonably be inferred as part of the investment powers granted the Bureau and the Industrial Commission under R.C. 4123.44-.442.⁴ Specifically, I have in mind the real estate investment powers granted by subdivision (F) of that section. R.C. 4123.442(F) states, in pertinent part, that the Administrator of the Bureau may invest any of the surplus or reserve of the

⁴ R.C. 4123.44-.442 describe the various investments in which surplus fund moneys, *see* R.C. 4123.34(B), may be placed. R.C. 4123.44(A) thus states that, "[t]he administrator of the bureau of workers' compensation, with the approval of the industrial commission, may invest any of the surplus or reserve belonging to the state insurance fund in any bonds, notes, certificates of indebtedness, mortgage notes, debentures, or other obligations or securities" as thereafter described in R.C. 4123.44(A)(1)-(6) and R.C. 4123.44(B). R.C. 4123.441 further states that the Administrator of the Bureau of Workers' Compensation may invest any of the surplus or reserve belonging to the state insurance fund "in the purchase of real property located within the state for the purpose of resale to the department

state insurance fund, *see* note one, *supra*, in "[p]roductive real estate within the state," and "[s]uch productive real estate shall be used for a public purpose, and may include a building or buildings to house the activities of the industrial commission, bureau of workers' compensation, and such other state public purposes as may be feasible and desirable." According to your letter, the construction of the two rehabilitation centers in question was undertaken pursuant to R.C. 4123.442(F) as an investment in productive real estate.⁵ What constitutes an "investment" in productive real estate, as understood by R.C. 4123.442(F), has not been defined by any provision in R.C. Chapter 4123. Nonetheless, the terms, "invest," and "investment," have been defined elsewhere as referring generally to the devotion of monetary resources to any type of activity that has as its purpose the realization of financial gain or profit. The following entry, for example, appears in *Black's Law Dictionary* (5th ed. 1979) at 741:

Investment. An expenditure to acquire property or other assets in order to produce revenue; the asset so acquired. The placing of capital or laying out of money in a way intended to secure income or profit from its employment....To purchase securities of a more or less permanent nature, or to place money or property in business ventures or real estate, or otherwise lay it out, so that it may produce a revenue or income. (Citation omitted.)

The term, "[i]nvestment property," is similarly defined as "any property purchased for the primary purpose of profit," and such profit "may be from income or from resale." *Id.* *See also Webster's New World Dictionary* (2d college ed. 1978) 741 ("invest" means, *inter alia*, "to put (money) into business, real estate, stocks, bonds, etc. for the purpose of obtaining an income or profit"); note nine, *infra*.

of transportation, if the administrator, with the approval of the industrial commission, has entered into an agreement with the director of transportation, pursuant to [R.C. 5501.112], in regard to the acquisition, use, and resale of such property." Finally, R.C. 4123.442 provides that, "[i]n addition to the investments authorized by [R.C. 4123.44], the administrator of the bureau of workers' compensation may invest any of the surplus or reserve belonging to the state insurance fund" in the obligations thereafter described in R.C. 4123.442(A)-(G).

Unlike R.C. 4123.44 or R.C. 4123.441, R.C. 4123.442 does not expressly condition the Administrator's exercise of the investment authority set forth therein upon the Industrial Commission's approval. The first paragraph of R.C. 4123.442 does, however, refer specifically to R.C. 4123.44, and it is a longstanding principle of statutory construction that statutory provisions that address the same subject matter or refer one to the other are *in pari materia* and are thus to be read and construed in a similar fashion. *State ex rel. Pratt v. Weyandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956); *Volan v. Keller*, 20 Ohio App. 2d 204, 253 N.E.2d 309 (Jefferson County 1969); *Beach v. Beach*, 99 Ohio App. 428, 134 N.E.2d 162 (Montgomery County 1955); 1988 Op. Att'y Gen. No. 88-079. Accordingly, R.C. 4123.442 must be read and construed *in pari materia* with R.C. 4123.44, and it therefore follows that the Administrator's exercise of the investment authority bestowed by R.C. 4123.442 is, as in the case of R.C. 4123.44, subject to approval by the Industrial Commission. *See also* R.C. 4121.121(G) ("[t]he administrator shall exercise the investment powers vested in the commission by section 4123.44 of the Revised Code, but all investments shall be such as the commission approves") (emphasis added).

⁵ You have not asked, and, therefore, I specifically offer no opinion whether the construction of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center properly qualifies as an investment in productive real estate for purposes of R.C. 4123.442(F). Nonetheless, the discussion that follows presumes that such construction represents a lawful exercise of the real estate investment powers conferred by that section.

Thus, under R.C. 4123.442(F), an investment in productive real estate by the Administrator of the Bureau may include the acquisition of real property where there is a reasonable expectation that such acquisition will eventually result in income or profit for the state insurance fund. Reasonably implicit in the power to acquire real property as an investment under R.C. 4123.442(F) is the reciprocal power to transfer or sell such property whenever such action, taken in accordance with sound and prudent principles of investing, will preserve, promote, and protect the financial integrity of the state insurance fund, or result in a financial gain therefor. Thus, for example, a change in prevailing market conditions may indicate that money invested in a particular parcel of real property is not yielding as large a return as originally anticipated, and that a more significant return will result if that money is devoted to one or more of the other investment alternatives enumerated in R.C. 4123.44-442. Conversely, market demand or other factors may cause certain real estate to so appreciate in value that the fund will realize a substantial gain through the sale of such property. In these, and similar, circumstances, the sale or transfer of productive real estate may be a wise and prudent investment decision for the state insurance fund. Accordingly, in such instances, it is reasonable to infer from R.C. 4123.442(F) authority on the part of the Administrator of the Bureau, with the approval of the Industrial Commission, to sell, transfer, or otherwise dispose of productive real estate that is held as an investment pursuant to the terms of that statute. In turn, it follows that the Administrator of the Bureau may, in the exercise of such authority, negotiate, enter into, and execute the terms of any agreements that pertain or are reasonably related to such sale or transfer. Thus, insofar as the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center constitute investments in productive real estate under R.C. 4123.442(F), the Administrator of the Bureau of Workers' Compensation, with the approval of the Industrial Commission, may sell, transfer, or otherwise dispose of such properties when it is determined that such action will inure to the financial benefit of the state insurance fund.

In this instance, you have asked specifically about the sale of these two properties to the Ohio Building Authority. I am of the opinion that such a sale is a permissible exercise of the powers conferred upon the Administrator of the Bureau, subject to the approval of the Industrial Commission, by R.C. 4123.442(F). I discern nothing in R.C. 4123.442(F) that might be interpreted as imposing any specific limitations upon the implied power of the Administrator of the Bureau of Workers' Compensation, with the approval of the Industrial Commission, to sell or transfer interests in real estate acquired previously as productive investments. In particular, there is nothing in R.C. 4123.442(F) to suggest that the sale or transfer of such interests shall be restricted or confined to only certain purchasers, or to particular categories of purchasers. Thus, in the absence of such a limitation, a sale of these two rehabilitation centers to OBA may be undertaken pursuant to the authority conferred upon the Administrator of the Bureau, subject to the approval of the Industrial Commission, by R.C. 4123.442(F). The Administrator of the Bureau, with the approval of the Industrial Commission, may, in turn, negotiate and enter into any agreements that pertain to or will facilitate such sale.

Cognate authority on the part of the Bureau of Workers' Compensation and the Industrial Commission to sell or transfer these properties to the Ohio Building Authority is also found in R.C. Chapter 152. R.C. Chapter 152 empowers OBA to engage in a broad range of activities for the general purpose of providing office buildings and other capital facilities for the use of the state and its agencies. *See, e.g.*, R.C. 152.04 (construction and operation of certain housing for the aged and disabled); R.C. 152.08 (powers of building authority); R.C. 152.09-.15; R.C. 152.17; R.C. 152.23 (issuance of revenue obligations to finance building authority projects); R.C. 152.19 (scope of building authority activities); R.C. 152.21 (powers of building authority with respect to capital facilities). Included among such activities is the acquisition of interests in real property, and any improvements thereto, from other agencies of the state. In this regard, R.C. 152.06(A) reads as follows:

Upon request of the Ohio building authority, a governmental entity may lease, grant, or convey to the authority any estate or interest in real or personal property, including improvements thereto, of or under the control of the governmental entity that is necessary or convenient to carry out the authorized purposes of the authority. A

lease, grant, or conveyance may include, without limitation, any estate or interest in public roads or other real or personal property, including improvements thereto, already devoted to public use. The lease, grant, or conveyance may be upon such terms as the authority and governing body of the governmental entity, or the governor in the case of real property the title to which is in the name of the state, agree and without advertisement, auction, competitive bidding, appraisals, court order, or other action or formality other than the regular and formal action of the governing body of the governmental entity or the governor. (Emphasis added.)

R.C. 152.22 further provides the following with respect to land conveyed to OBA pursuant to the terms of, *inter alia*, R.C. 152.06:

Where land is made available or conveyed to the Ohio building authority under section 152.05 or 152.06 of the Revised Code for the purposes of section 152.19 of the Revised Code, the permission to use or the conveyance may include improvements on such land, whether or not it is needed, required, or to be required by the state agency. Permission to use may include permission to demolish existing buildings. Land used by the authority pursuant to section 152.05 or 152.06 of the Revised Code shall not be mortgaged by the authority.

R.C. 152.09, which addresses the general authority of OBA to issue revenue obligations for the purpose of financing its various activities and projects, *see* R.C. 152.09(B), also defines several terms used in R.C. 152.06 and R.C. 152.09-33. As pertains herein, R.C. 152.09(A) provides the following definitions:

(2) "State agencies" means the state of Ohio and branches, officers, boards, *commissions, authorities, departments, divisions, courts, general assembly, or other units or agencies of the state.* "State agency" includes counties, municipal corporations, and political subdivisions of this state that enter into leases with the Ohio building authority pursuant to section 152.31 of the Revised Code or that are designated by law as state agencies for the purpose of performing a state function that is to be housed by a capital facility for which the Ohio building authority is authorized to issue revenue obligations pursuant to sections 152.09 to 152.33 of the Revised Code.

....
(4) "Capital facilities" means *buildings, structures, and other improvements, and equipment, real estate, and interests in real estate therefor,* within the state, and any one, part of, or combination of the foregoing, for housing of branches and agencies of state government, including capital facilities for the purpose of housing personnel, equipment, or functions, or any combination thereof that the state agencies are responsible for housing, for which the Ohio building authority is authorized to issue obligations pursuant to Chapter 152. of the Revised Code, and includes storage and parking facilities related to such capital facilities.

(5) "Cost of capital facilities" means the costs of *acquiring, constructing, reconstructing, rehabilitating, remodeling, renovating, enlarging, improving, equipping, or furnishing capital facilities,* and the financing thereof,...and such other expenses as may be necessary or incident to the acquisition, construction, reconstruction, rehabilitation, remodeling, renovation, enlargement, improvement, equipment, and furnishing of capital facilities, the financing thereof and the placing of the same in use and operation, including any one, part of, or combination of such classes of costs and expenses.

(6) "Governmental entity" means *any state agency,* municipal corporation, county, township, school district, and any other political subdivision or special district in this state established pursuant to law, and, except where otherwise indicated, also means the United States or any of the states or any department, division, or agency thereof, and any agency, commission, or authority established pursuant to an interstate compact or agreement. (Emphasis added.)

Pursuant to R.C. 152.06(A), therefore, a governmental entity may, at OBA's request, lease, grant, or convey to OBA any estate or interest in real property, including improvements thereto, that such entity owns or retains under its control when necessary or convenient to carry out the statutory purposes of OBA. R.C. 152.09(A)(6) provides that the term, "[g]overnmental entity," includes any "state agency," which is further defined in R.C. 152.09(A)(2) to include "commissions, authorities, departments, divisions,...or other units or agencies of the state."

The Bureau of Workers' Compensation and the Industrial Commission are clearly "[s]tate agencies," as defined in R.C. 152.09(A)(2), and, therefore, are "[g]overnmental entities," as defined in R.C. 152.09(A)(6), for purposes of R.C. 152.06(A). They are thus empowered by R.C. 152.06(A) to lease, grant, or convey to OBA any estate or interest in real property, and any improvements thereto, that they own or over which they exercise control, when necessary or convenient to carry out the statutory purposes of OBA. Because the Bureau and the Industrial Commission exercise control over the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, it follows that the Administrator of the Bureau, with the approval of the Industrial Commission, may convey such properties to OBA when necessary or convenient to further the statutory purposes of OBA. The Administrator of the Bureau may also negotiate and enter into agreements with OBA that pertain to or will facilitate such conveyance.

You have also indicated that OBA anticipates issuing revenue obligations for the purpose of raising the funds that will be used to pay for these properties. The proceeds that OBA receives from the sale of those revenue obligations will be paid to the Administrator who will thereafter deposit the moneys thus received into the state insurance fund, for subsequent reinvestment in accordance with the terms of R.C. 4123.44-.442. The issuance and sale of revenue obligations by OBA for this purpose appears to be a proper exercise of the general financing authority granted it by R.C. Chapter 152. In this regard, R.C. 152.09(B) states, in pertinent part, as follows:

Pursuant to the powers granted to the general assembly under Section 2i of Article VIII, Ohio Constitution,⁶ to authorize the issuance of revenue obligations and other obligations, the owners or holders of which are not given the right to have excises or taxes levied

⁶ Article VIII, §2i of the Ohio Constitution states, in part, as follows:

The general assembly also may authorize the issuance of revenue obligations and other obligations, the owners or holders of which are not given the right to have excises or taxes levied by the general assembly for the payment of principal thereof or interest thereon, for such capital improvements for mental hygiene and retardation, parks and recreation, state supported and state assisted institutions of higher education, including those for technical education, water pollution control and abatement, water management, and housing of branches and agencies of state government, which obligations shall not be subject to other provisions of this section and shall not be deemed to be debts or bonded indebtedness of the state under other provisions of this Constitution. Such obligations may be secured by a pledge under law, without necessity for further appropriation, of all or such portion as the general assembly authorizes of charges for the treatment or care of mental hygiene and retardation patients, receipts with respect to parks and recreational facilities, receipts of or on behalf of state supported and state assisted institutions of higher education, or other revenues or receipts, specified by law for such purpose, of the state or its officers, departments, divisions, institutions, boards, commissions, authorities, or other state agencies or instrumentalities, and this provision may be implemented by law to better provide therefor. (Emphasis added.)

by the general assembly for the payment of principal thereof or interest thereon, *the Ohio building authority may issue obligations, in accordance with Chapter 152. of the Revised Code, and shall cause the proceeds thereof to be applied to the costs of capital facilities designated by or pursuant to act of the general assembly for housing state agencies* as authorized by Chapter 152. of the Revised Code. The authority shall provide by resolution for the issuance of such obligations. The bond service charges and all other payments required to be made by the trust agreement or indenture securing such obligations shall be payable solely from available receipts of the authority pledged thereto as provided in such resolution. (Emphasis and footnote added.)

See generally 1979 Op. Att'y Gen. No. 79-103. R.C. 152.09(F) further provides that OBA, pursuant to Ohio Const. art. VIII, §21, may issue revenue obligations for paying the cost of capital facilities for housing branches and agencies of state government as are authorized by R.C. Chapter 152 and the General Assembly "by the appropriation of lease payments or other moneys for such capital facilities or by any other act of" the General Assembly. Thus, OBA may issue and sell revenue obligations to pay the cost of capital facilities for housing branches and agencies of state government so long as the General Assembly appropriates lease payments or other moneys, or takes other appropriate action, that makes it clear that it authorizes and approves of OBA's proposed undertaking. As I have already noted, R.C. 152.09(A)(4) defines "[c]apital facilities" to include interests in real estate and buildings and other improvements situated on such real estate, and R.C. 152.09(A)(5) includes among the costs of such capital facilities expenditures incurred in their acquisition. Accordingly, OBA's purchase of these properties pursuant to R.C. 152.06(A) constitutes an acquisition of capital facilities,⁷ the cost of which may properly be financed by the sale and issuance of revenue obligations by OBA, in accordance with the procedures and requirements set forth in R.C. 152.09-.17.

In your second question you have asked about the Industrial Commission's fiduciary responsibility to the state insurance fund vis-a-vis the purchase price paid by OBA in conjunction with the sale transaction described in your first question. Specifically, you wish to know whether the Industrial Commission will breach any fiduciary responsibility to the state insurance fund should the market value of these two rehabilitation centers, as subsequently reflected in the purchase price paid therefor, be less than their original cost, thus resulting in a reduction in investment income for the state insurance fund to the detriment of fund contributors.

Resolution of this particular question requires that I examine initially the precise character and scope of fiduciary responsibility, if any, that the Industrial Commission bears with respect to the state insurance fund. Pursuant to Ohio Const. art. II, §35, *see note three, supra*, the General Assembly has, in R.C. 4123.30, established a fund for the purpose of providing compensation to Ohio workers (and their dependents, should the circumstances so warrant) who, having properly qualified therefor, have either died or have sustained injuries or diseases in connection with their employment. R.C. 4123.30 thus states, in pertinent part, as follows:

Money contributed by the employers mentioned in division (B)(1) of section 4123.01 of the Revised Code constitutes the "public fund" and the money contributed by employers mentioned in division (B)(2) of such section constitutes the "private fund." Each such fund shall be

⁷ The foregoing discussion of R.C. 152.06 is intended to make it clear that such section provides an alternate source of authority for the Bureau of Workers' Compensation, with the approval of the Industrial Commission, to convey these two rehabilitation centers to the Ohio Building Authority, and should not be understood as imposing a limitation or restriction upon OBA's exercise of specific authority that may be conferred upon it by other provisions in R.C. Chapter 152 to acquire or purchase these properties.

collected, distributed, and its solvency maintained without regard to or reliance upon the other. Whenever in sections 4123.01 to 4123.94 of the Revised Code, reference is made to *the state insurance fund*, such reference is to such two separate funds but such two separate funds and the net premiums contributed thereto by employers after adjustments and dividends, except for the amount thereof which is set aside for the investigation and prevention of industrial accidents and diseases pursuant to Section 35 of Article II, Ohio Constitution, any amounts set aside for actuarial services authorized or required by sections 4123.44 and 4123.47 of the Revised Code or for fees and costs authorized by section 4123.51 of the Revised Code, and any amounts set aside to reinsure the liability of the respective insurance funds for the following payments, constitute a trust fund for the benefit of employers and employees mentioned in sections 4123.01, 4123.03, and 4123.73 of the Revised Code for the payment of compensation, medical services, examinations, recommendations and determinations, nursing and hospital services, medicine, rehabilitation, death benefits, funeral expenses, and like benefits for loss sustained on account of injury, disease, or death provided for by sections 4123.01 to 4123.94 of the Revised Code, and for no other purpose. (Emphasis added.)

As is evident from the foregoing language of R.C. 4123.30, the state insurance fund is comprised of the aggregate contributions received from the categories of Ohio employers, public and private, enumerated in R.C. 4123.01(B)(1) and (2).⁸ The procedures and methods that govern the calculation, assessment, and collection of those contributions are further set forth in other provisions that appear in R.C. Chapter 4123. See, e.g., R.C. 4123.29 (premium rates for state insurance fund); R.C. 4123.34 (premium rates fixed and maintained); R.C. 4123.35 (payments to state insurance fund by private employers); R.C. 4123.38; R.C. 4123.39 (contributions to state insurance fund by public employers); R.C. 4123.40 (estimates of state's contribution to state insurance fund); R.C. 4123.41 (annual payments by counties to state insurance fund).

Certain percentages of the moneys contributed by employer under R.C. 4123.30 are subsequently segregated for deposit into individual accounts within the

⁸ R.C. 4123.01 states, in part, as follows:

As used in Chapter 4123. of the Revised Code:

....
(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by Chapter 4123. of the Revised Code.

All such employers are subject to Chapter 4123. of the Revised Code. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered a workman or operative in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more workmen and the income derived from such labor shall be reported to the industrial commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

state insurance fund, or into separate funds distinct therefrom, for uses other than the compensation of injured workers or their dependents. Thus, for example, Ohio Const. art. II, §35 provides that there shall be set aside from such contributions a "separate fund...to be expended...in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases," and in R.C. 4121.37 the General Assembly has created an administrative subagency of the Industrial Commission that is responsible for administering this fund and making expenditures therefrom for investigating and researching the prevention of industrial accidents and diseases. See generally 1979 Op. Att'y Gen. No. 79-110 at 2-349 (the safety and hygiene fund established by R.C. 4121.37, pursuant to the mandate of Ohio Const. art. II, §35, "is clearly a fund separate and distinct from the State Insurance Fund"). Other such "set asides" are enumerated in R.C. 4123.30, and these include certain amounts for actuarial services authorized or required by R.C. 4123.44 and R.C. 4123.47, or for administrative and court costs incurred in connection with the hearing of disputed claims pursuant to R.C. 4123.515-.519 (formerly R.C. 4123.51), and any amounts used to reinsure the liability of the respective insurance funds for compensation paid therefrom to injured workers or their dependents. In addition, R.C. 4123.34 provides that a portion of the moneys contributed under R.C. 4123.30 to the state insurance fund shall be used to create and maintain a surplus fund, R.C. 4123.34(B), which, *inter alia*, may be invested by the Bureau and the Industrial Commission in the manner prescribed by R.C. 4123.44-.442, and a premium payment security fund, which is an account used to pay for any premiums that are due from an employer and that remain uncollected, R.C. 4123.34(D). See generally 1980 Op. Att'y Gen. No. 80-072 at 2-287 (the surplus fund created pursuant to R.C. 4123.34(B) is an account within the state insurance fund rather than a separate and distinct fund).

R.C. 4123.30 expressly provides that, subject to the exceptions specified therein, all moneys paid into the state insurance fund by contributing employers "constitute a trust fund for the benefit of employers and employees." Related provisions within R.C. Chapter 4123 impose upon the Industrial Commission a responsibility to maintain the financial integrity and solvency of this trust fund, and to carefully monitor and approve all disbursements therefrom. Thus, R.C. 4123.32 states that the Industrial Commission "shall adopt rules with respect to the collection, maintenance, and disbursements of the state insurance fund," including "[s]uch special rules as the commission considers necessary to safeguard the fund and as are just in the circumstances," R.C. 4123.32(D). Similarly, R.C. 4123.29 directs the Industrial Commission to set employer contribution rates and premiums "at a level that assures the solvency of the [state insurance] fund." It is, therefore, apparent that the Industrial Commission does, in fact, bear a special responsibility to the state insurance fund, a responsibility properly analogous to that traditionally identified or associated with a trustee or similar fiduciary. In this regard, a "trustee" has been defined generally as "a person in whom there is vested, for the benefit of another, some estate, interest or power in or affecting property." *Muth v. Maxton*, 68 Ohio L. Abs. 164, 170, 119 N.E.2d 162, 166 (C.P. Montgomery County 1954) (emphasis added). *Black's Law Dictionary* at 1357 also defines a "[t]rustee," in part, as

one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another called the cestui que trust....In a strict sense, a "trustee" is one who holds the legal title to property for the benefit of another, while, in a broad sense, the term is sometimes applied to anyone standing in a fiduciary or confidential relation to another, such as agent, attorney, bailee, etc. (Citations omitted.)

A "fiduciary" has been defined as "a person having a duty, created by his undertaking, to act *primarily for the benefit of another* in matters connected with his undertaking." *Haluka v. Baker*, 66 Ohio App. 308, 312, 34 N.E.2d 68, 70 (Wayne County 1941) (emphasis in original). Similarly, the following entry appears for the term, "[f]iduciary":

The term is derived from the Roman law, and means (as a noun) *a person holding the character of a trustee, or a character analogous to that of a trustee*, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person

having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. As an adjective it means *of the nature of a trust; having the characteristics of a trust; analogous to a trust*; relating to or founded upon a trust or confidence.

A person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract; e.g. executor of estate; receiver in bankruptcy; trustee. A trustee, for example, possesses a fiduciary responsibility to the beneficiaries of the trust to follow the terms of the trust and the requirements of applicable state law. A breach of fiduciary responsibility would make the trustee liable to the beneficiaries for any damage caused by such breach.

The status of being a fiduciary gives rise to certain legal incidents and obligations, including the prohibition against investing the money or property in investments which are speculative or otherwise imprudent. (Emphasis added.)

Black's Law Dictionary at 563.

Thus, that the Industrial Commission should be characterized, albeit figuratively, as a trustee or fiduciary with respect to the state insurance fund is both reasonable and appropriate. Such standing on the part of the Industrial Commission is, by definition, accompanied by an obligation (*i.e.*, a "fiduciary responsibility") to adhere to certain recognized standards of judgment and care when making any decisions or taking any actions that may have an effect upon the fiscal integrity of the state insurance fund, and, in turn, the beneficial interests thereby represented. This is especially true when the Industrial Commission acts pursuant to the investment authority conferred upon it by R.C. Chapter 4123, which is at issue here.

The generally accepted rule is that one who acts in a fiduciary capacity for the benefit of another must exercise that degree of care, skill, and judgment as would be exercised by a reasonable, prudent person in the same or similar circumstances. Thus, the Restatement (Second) of Trusts §174 (1959) states that a trustee is "under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property," and that if a trustee "has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Comment *a* to §174 states, in part, that a trustee "is liable for a loss resulting from his failure to use the care and skill of a man of ordinary prudence, although he may have exercised all the care and skill of which he was capable," and comment *b* further notes that "[w]hether the trustee is prudent in the doing of an act depends upon the circumstances as they reasonably appear to him at the time when he does the act and not at some subsequent time when his conduct is called in question." Similarly, §§176 and 181 of the Restatement provide respectively that a trustee is under a duty to the beneficiary to use reasonable care and skill "to preserve the trust property" and "to make the trust property productive." Regarding the exercise of investment powers⁹ in particular, §227 of the Restatement provides that a trustee is under a duty to the beneficiary to "make such investments and only such investments as a

⁹ Pursuant to R.C. 4121.30 and R.C. 4121.31, administrative rules have been promulgated that address, *inter alia*, general policies of the Bureau of Workers' Compensation and the Industrial Commission, including those pertaining to the investment of state insurance fund surplus moneys under R.C. 4123.44-.442. See 6 Ohio Admin. Code, Chapter 4123-9. In this regard, rule 4123-9-01(E) states, in part, as follows:

The main functions of the bureau of workers' compensation shall consist of:

....

Proper investments by the bureau and the industrial commission of the surplus and/or reserves, in accordance with the statute. "Investment" means the use of money for the purpose of producing income or to increase capital (assets), or

prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived," §227(a), and "conform to the statutes, if any, governing investments by trustees," §227(b).

Thus, the Industrial Commission shall be guided by the foregoing standards of care and judgment whenever it exercises any of the investment powers conferred upon it by R.C. Chapter 4123 in conjunction with the administration and management of the state insurance fund. A failure on the part of the Commission to abide by those standards will, in the appropriate circumstances, constitute a breach of the Commission's fiduciary responsibility to the fund and to the beneficiaries thereof.

In this instance you have inquired about the Industrial Commission's exercise of the power conferred upon it to approve the investment of the state insurance fund surplus in productive real estate pursuant to R.C. 4123.442(F). According to your letter, the construction of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center was undertaken as an investment in productive real estate pursuant to R.C. 4123.442(F). The Commission now proposes to approve the sale by the Bureau of Workers' Compensation of those two rehabilitation centers to OBA, and it is possible that the market value price of those properties will be less than the cost originally expended on their construction and development. You wish to know whether a sale of these two properties at such price will constitute a breach of the Industrial Commission's fiduciary responsibility to the state insurance fund insofar as the fund will, as a result, experience a diminution in the amount of income it would otherwise have received from these particular investments.

The dispositive inquiry in this regard is whether a decision by the Industrial Commission to approve the sale of these properties at the lower market value price is reasonable and prudent, notwithstanding the financial loss that may be sustained by the state insurance fund as a result of that decision. As a practical matter, whether that decision should be characterized as reasonable and prudent, or unreasonable and imprudent, will depend upon the factual circumstances that prevail at the time the proposed sale is consummated. In that regard, a variety of factors will have to be examined and weighed before an opinion on this point can be offered with any conclusive certainty. For example, the time at which the sale occurs, the likelihood that the market value of these properties will, at some future date, equal or exceed the costs incurred in their construction, the amount by which those original costs exceed the current market value of these properties, the approximate amount of the reduction in income to the state insurance fund that may reasonably be expected as a result of a sale of these properties at the current market value price, and the extent to which the Industrial Commission, in proceeding with the approval of such sale, relies upon the opinions of investment counselors who are recognized experts in this field will, *inter alia*, have an important bearing in determining whether the Commission's decision is a product of reasoned, prudent judgment.

both. "Reserves" is understood to mean the potential future cost of open industrial claims. "Surplus" means uncommitted reserves to guarantee the solvency of the state insurance fund and to meet unforeseen contingencies. The portfolio shall be managed in such a way as to meet the legal obligations of the bureau and the industrial commission as well as to provide maximum return on investments made. "Portfolio" is understood to mean the entire holdings in various types of investments, including, but not to be limited to, stocks, bonds and commercial paper owned by an investor.

Rule 4123-9-02(A)(9) further creates an investment section within the Bureau that has the responsibility of making investment recommendations in accordance with the provisions in R.C. 4123.44-.442, and managing and overseeing those investments.

In addition to the specific factors enumerated above, the Industrial Commission should also bear in mind the general investment standards that appear in 6 Ohio Admin. Code 4123-9-11. In this regard, rule 4123-9-11 enumerates the various functions that the investment section of the Bureau of Workers' Compensation is to perform. In particular, rule 4123-9-11(E) describes the type of investment programs that the investment section shall pursue, and the general criteria by which particular investment proposals and decisions are to be evaluated:

(E) In order to properly discharge the assigned duties, the investment section shall develop and maintain the following investment program:

(1) Determining the investment objectives, including, but not limited to, the combination of safety, income and capital growth. Two essential criteria shall be used to evaluate the investment merits of a portfolio:

(a) The return that the bureau and the industrial commission expect to receive from the portfolio;

(b) The risk to which the funds invested are exposed in order to receive this return.

(2) Deciding upon the types of investments, in accordance with the statute, and the proportions of each to be obtained; making investments of varied types and maturity dates, in various industries and localities (diversification) to reduce possible errors in judgment.

(3) Selecting specific investments to ensure quality and stability. In establishing selection policies proper consideration should be given to at least the following factors:

(a) Safety of principal, adequate liquidity (capacity to be sold for cash or borrowed on to full value without delay) and collateral (secured or guaranteed by property) value, adequacy of income and/or capital gain, and purchasing power stability.

(b) "Efficient portfolio" theory: An efficient portfolio is one that offers the largest return compatible with a specified degree of risk, or which minimizes the risk accompanying a sought-for level of return. Risks on a portfolio are diminished by selecting individual investments with opposite and offsetting patterns of expected fluctuation.

(4) Studying the long-run values of investments and timing their purchases and sales in light of price fluctuation of unstable investment markets.

Accordingly, the conclusion is by no means certain that a decision by the Industrial Commission to approve the sale of these properties to OBA at a price that is less than the costs that were incurred in their acquisition and development is unreasonable and imprudent. Nonetheless, the need to carefully consider the entire circumstance of the proposed sale in this particular regard cannot be emphasized too strongly. Cf., e.g., Restatement (Second) of Trusts §227 comment e ("[i]t is impossible to lay down a hard-and-fast rule as to what is a prudent investment, since much may depend upon the time and place of the administration of the trust, and much may depend upon the character of the particular trust"). Upon a careful and studied application of the factors I have described above, as well as the general investment standards and criteria that appear in rule 4123-9-11(E), the Industrial Commission may find it possible to conclude that a sale of these two properties at a price that is less than the total amount of costs incurred in their construction and development is, on balance, a reasonable and prudent investment decision.

You also have asked about the authority of the Industrial Commission and the Bureau of Workers' Compensation to renegotiate the terms of their present lease agreement as an alternative to a sale of these properties to OBA. According to your letter, the Industrial Commission and the Bureau are contemplating renegotiating the amount of rent the Commission pays the Bureau for its lease of these two rehabilitation centers. They are proposing to reduce the amount of such rent to a level that will reflect a rate of return that is less than the average rate of return paid on fixed-income investments of the state insurance fund. You wish to know whether the Industrial Commission and the Bureau may agree to such a modification of their lease agreement.

As in the case of your first two inquiries, resolution of this question requires a consideration of two distinct issues: whether the Industrial Commission and the

Bureau may, in fact, negotiate a modification of the amount of rent that shall be paid under their present lease agreement; and whether such modification, to the extent that it causes a reduction in the amount of investment income received by the state insurance fund, implicates the Industrial Commission's fiduciary responsibility to the fund. Recently, I had occasion to discuss the general legal principles that control when local governmental entities seek to modify or renegotiate certain aspects of a contract or other binding agreement to which they are parties. In 1988 Op. Att'y Gen. No. 88-076 I was asked several questions regarding the renegotiation of contracts for fire protection between a village and six individual townships. See R.C. 9.60(B) and (C) (authorizing such contracts between, *inter alia*, a village and a township). The contracts provided that the village would furnish all fire and medical squad services to the townships, and that as consideration therefor the townships would pay the village the amounts specifically enumerated in the contracts. Because of unforeseen budgeting problems, the village wished to renegotiate the contracts for the purpose of increasing the amounts the townships would pay the village for its fire and medical squad services; failing an amicable renegotiation on this point, the village proposed to reduce unilaterally the level of such services it would thereafter provide to each township.

In addressing these questions, I reviewed the general principles of law that ordinarily apply to the modification or renegotiation of contracts between governmental bodies:

It has been established, as a general rule, that the contracts of a governmental entity, "unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals." *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 148, 128 N.E. 58, 59 (1920); see *State ex rel. Cutler v. Pike County Joint Area Vocational School District*, 6 Ohio St. 3d 138, 451 N.E.2d 800 (1983); *Ferdinand v. Hamilton Local Board of Education*, 17 Ohio App. 3d 165, 171, 478 N.E.2d 835, 842 (Franklin County 1984), *motion to certify dismissed*, No. 84-1070 (Ohio Sup. Ct. Aug. 2, 1984) ("a board of education is bound by a continuing contract under ordinary contract law..."). Since no statutory provision authorizes a village to compel renegotiation of a contract in the circumstances that you have described, and since the contract in question does not provide for such renegotiation, the general rule governing changes to a contract comes into effect: "A consent to alteration of rights under a written contract must be by agreement of the parties upon sufficient consideration." *Hinkler v. Equitable Life Assurance Society*, 61 Ohio App. 140, 143, 22 N.E.2d 451, 452 (Hamilton County 1938). Consideration for modification or abrogation of a contract may be found in mutual waivers of rights under the contract, and one party to a contract may attempt to persuade the other party that modification of the contract would be to the mutual benefit of the parties. See *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. at 148, 128 N.E. at 59; *Murrell v. Elder-Beerman Stores Corp.*, 16 Ohio Misc. 1, 239 N.E.2d 248 (C.P. Montgomery County 1968). Absent statutory or contractual terms providing for renegotiation, however, one party to a contract has no power to require another party to renegotiate the terms of the contract. See, e.g., *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853, 857 (6th Cir. 1963) ("[p]arties to a contract may amend, modify or cancel a contract in such manner as is agreeable to them"). See generally *Logan Natural Gas & Fuel Co. v. City of Chillicothe*, 65 Ohio St. 186, 62 N.E. 122 (1901).

Op. No. 88-076 at 2-371 and 2-372.

I see no reason why the foregoing principles should not similarly apply in this instance. Because you have not indicated to the contrary, I shall presume that there is no provision within your present lease agreement that prohibits the Industrial Commission and the Bureau from renegotiating or modifying its terms. My research also has not disclosed any statutory provision that limits or restricts the actions of the Commission or the Bureau in that regard. As a general matter, therefore, it appears that the Industrial Commission and the Bureau of Workers' Compensation may agree to modify the terms of the present agreement that governs the lease of

the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center to the Commission.

Whether the Industrial Commission and the Bureau should agree to the specific modification described in your letter presents a much closer question. You indicate that the Commission and the Bureau are contemplating a reduction in the amount of rent that the Commission pays the Bureau for the use of these two rehabilitation centers. The rent is to be set at a level that will garner a rate of return for the state insurance fund that is less than the average rate of return paid on the fund's fixed-income investments. You have indicated that such rent reduction is being considered as a method of reducing the total amount of administrative costs chargeable to the Commission in connection with the operation of these two rehabilitation centers.

Insofar as the foregoing rent reduction proposal will diminish the amount of income that would otherwise be produced for the state insurance fund, its implementation might be viewed as a breach of the Industrial Commission's fiduciary responsibility to the state insurance fund. As in the case of your second question, I find that I am unable to provide you a definitive answer on this point because such a determination may ultimately depend upon various factual issues that simply are not amenable to resolution by way of the formal opinion-rendering process. Nonetheless, several observations are at this time appropriate. First, a decision by the Industrial Commission to implement the rent reduction proposal as you have described it must be evaluated by the same standards of care, skill, and judgment as apply to the Commission's other investment decisions. This means that the Commission must be able to demonstrate that this particular decision, insofar as it adversely affects the financial condition of the state insurance fund, is one that a reasonable and prudent investor, having knowledge of all the relevant facts, would make in the same or similar circumstances.

You should also be aware that the Industrial Commission's fiduciary responsibility to the state insurance fund includes an obligation to ensure that the Commission's actions and decisions are guided at all times by a strong sense of loyalty to the fund. The Restatement (Second) of Trusts §170(1) thus declares that a trustee has a duty "to administer the trust solely in the interest of the beneficiary," and comment *a* thereto further states that, as to matters within the scope of the fiduciary relationship, a trustee "is under a duty not to profit at the expense of the beneficiary." This duty of loyalty thus demands that a trustee carefully avoid all forms of self-dealing in matters pertaining to the administration and management of his trust. In this instance, there may be some merit to the proposition that the Industrial Commission's rent reduction proposal is colored by a certain element of self-dealing insofar as it is intended to provide a tangible financial benefit (*i.e.*, lower overall administrative costs) to the Industrial Commission at the expense of the state insurance fund. To the extent that such action is determined to constitute a breach of the Commission's duty of loyalty to the fund, the Commission may be held liable for the financial loss thereby incurred by the fund. See generally Restatement (Second) of Trusts §205 (liability of trustee for a breach of trust); §206 (liability of trustee for breach of the duty of loyalty).

Based upon the foregoing, therefore, it is my opinion, and you are advised that:

1. Pursuant to R.C. 4123.442(F), the Bureau of Workers' Compensation, with the approval of the Industrial Commission of Ohio, may enter into an agreement with the Ohio Building Authority for the sale thereto of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center. In accordance with Ohio Const. art. VIII, §21 and R.C. 152.09(B), the Ohio Building Authority may issue revenue obligations for the purpose of financing its acquisition of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, provided the General Assembly, as directed by R.C. 152.09(F), appropriates lease payments or other moneys for such rehabilitation centers, or by other act authorizes such acquisition.

2. Pursuant to R.C. 152.06(A), the Bureau of Workers' Compensation, with the approval of the Industrial Commission of Ohio, may enter into an agreement with the Ohio Building Authority for the conveyance thereto of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center when necessary or convenient to carry out the statutory purposes of the Ohio Building Authority. In accordance with Ohio Const. art. VIII, §2i and R.C. 152.09(B), the Ohio Building Authority may issue revenue obligations for the purpose of financing its acquisition of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center, provided the General Assembly, as directed by R.C. 152.09(F), appropriates lease payments or other moneys for such rehabilitation centers, or by other act authorizes such acquisition.
3. R.C. Chapter 4123 confers upon the Industrial Commission of Ohio a fiduciary responsibility to preserve and safeguard the financial integrity and solvency of the state insurance fund that has been created pursuant to Ohio Const. art. II, §35 and R.C. 4123.30. Such a responsibility on the part of the Industrial Commission includes an obligation to adhere to certain standards of judgment and care when making decisions or taking actions that may affect the financial integrity and soundness of the state insurance fund, including any decisions or actions that pertain or relate to the Industrial Commission's approval of the Bureau of Workers' Compensation's exercise of the investment powers conferred upon it by R.C. Chapter 4123, as set forth in R.C. 4123.44-.442. Approval by the Industrial Commission of all investment actions and decisions of the Bureau of Workers' Compensation under R.C. 4123.44-.442 shall be guided by the same standards of care and judgment as would be followed by a reasonable and prudent investor in the same or similar circumstances.
4. Whether a sale of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center to the Ohio Building Authority for a price that is less than the total amount of costs actually incurred in their construction and development represents a reasonable and prudent investment decision on the part of the Bureau of Workers' Compensation and the Industrial Commission of Ohio will depend upon the factual circumstances that prevail at the time such a sale is consummated.
5. The Bureau of Workers' Compensation and the Industrial Commission of Ohio may agree to modify or renegotiate the terms of the present agreement that governs the Bureau's lease of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center to the Industrial Commission, provided there is no provision within that agreement that prohibits or otherwise restricts such a modification or renegotiation.
6. A decision by the Industrial Commission of Ohio to agree to a reduction in the amount of rent it pays the Bureau of Workers' Compensation under the terms of the present agreement that governs the Bureau's lease of the W.O. Walker Industrial Rehabilitation Center and the J. Leonard Camera Industrial Rehabilitation Center shall be guided by the same standards of care and judgment as would be followed by a reasonable and prudent investor in the same or similar circumstances. The factual circumstances that prevail at the time such decision is made and implemented will determine whether a rent reduction that yields a rate of return less than the average rate of return on the state insurance fund's fixed-income investments is the product of a reasonable and prudent investment decision.