

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM
Office of Chief Counsel

DATE: October 31, 2005

SUBJECT: Pennsylvania School Boards Association Membership in the
Public School Employees' Retirement System

TO: Jeffrey B. Clay
Executive Director

FROM: Gerald Gornish
Chief Counsel

From time to time the Pennsylvania School Employees' Retirement System ("PSERS") receives inquiries from members of the General Assembly and others as to the basis for the conclusion that employees of the Pennsylvania School Boards Association ("PSBA") can be members of PSERS. You have requested me to review prior research on the above subject and to prepare a memorandum responsive to these inquiries. My research discloses that this question has been raised periodically since at least 1939, during all of which time the employees of PSBA and its predecessors have been permitted to be members of PSERS.

Background of PSBA

PSBA was incorporated in 1961 under the Pennsylvania Nonprofit Corporation Law as "Pennsylvania State School Directors Association." In 1962, it amended its charter, among other things, to change its name to "Pennsylvania School Boards Association."¹ Prior to that time, it appears to have been an unincorporated association.²

Membership in PSBA is by school district or other eligible local educational entity, such as intermediate unit, community college or vocational-technical school. Local school boards join PSBA, but PSBA services are provided to the boards, administrative staff, individual school directors and to the school districts themselves. School boards pay

¹ According to information received from PSBA, this was preceded by a merger of the Pennsylvania State School Directors Association and the Pennsylvania School Board Secretaries Association.

² The Act of May 11, 1939, P.L. 119 (No. 56) authorized school boards to become members of, and pay membership dues to, the "State School Directors Association." This would appear to substantiate the existence of that entity as an unincorporated association – even before 1961 when it was incorporated.

Jeffrey B. Clay
October 31, 2005
Page 2

annual dues as members of PSBA, and the dues are paid with school district funds. PSBA employs a staff of approximately 90 individuals who are currently members of PSERS.

Statutory References

The Public School Employees' Retirement Code ("Retirement Code") makes only one mention of PSBA, at 24 Pa. C.S. §8501(a). This provides that the Executive Director of PSBA is an "Ex Officio" member of the PSERS Board.

More significantly, the Public School Code of 1949, as amended ("Public School Code"), 24 P.S. §5-516, specifically authorizes any school board or board of education to become a member of PSBA. That section, as amended through 1963, currently reads in full as follows:

The board of school directors or the board of public education of any school district may appoint one or more of its members, its non-member secretary, if any, and its solicitor, if any, as delegates to any State convention or association of school directors, held within the Commonwealth. It shall be the duty of such delegates to attend the meetings of such convention or association, and each delegate so attending shall be reimbursed for travel, travel insurance, lodging, meals, registration fees and other incidental expenses necessarily incurred. Any such board may become a member of the Pennsylvania School Boards Association, Inc., and may pay, out of the school funds of the district, any membership dues which may be assessed by the association at any State convention of school directors to defray the necessary expenses of maintaining the association and of holding the convention. Such expenses shall be paid by the treasurer of the school district, in the usual manner, out of the school funds of the district, upon the presentation of an itemized, verified statement of such expenses.

Thus we see that although PSBA was not created by state legislation, its existence has been statutorily recognized and given legislative sanction. Moreover, legislation specifically authorizes the use of school funds, i.e. tax funds, to support PSBA.

The history of section 516 of the Public School Code, is instructive.

o By the Act of April 18, 1919, P.L. 56 (No. 44), section 410 of the 1911 School Code was added. It provided:

The board of school directors of each district may appoint from among their number one delegate to any State convention or association of school directors held within the Commonwealth.

The Act further required school boards to reimburse the delegate for the expenses incurred in attending the State convention. This provision shows that as early as 1919, there was a statewide, albeit unnamed, association of school boards.

o By the Act of May 4, 1927, P.L. 684 (No. 345), section 410 was amended to allow the secretary of each school board to attend "the annual State convention or association of secretaries of boards of school directors to be held at the same time and place as the State convention or association of school directors," and, likewise, to be reimbursed by the school board. This provision shows that at least by 1927, there was a regular annual convention of school board directors that was joined by a convention of school board secretaries.³

o By the Act of May 11, 1939, P.L. 119 (No. 56), section 410 of the 1911 School Code was amended to add the following provision:

Any such board may become a member of the State School Directors Association, and may pay, out of the school funds of the district, any membership dues which may be assessed by the association at any State convention of school directors to defray the necessary expenses of maintaining the association and of holding the convention.

This provision demonstrates that at least by 1939⁴ the State School Directors Association had been formed, presumably as an unincorporated association (it was not incorporated until 1961); to assist and represent the interests of the various school boards in the Commonwealth. The unnamed association finally was named. Reference to the assessment of dues at the "State convention of school directors" in this amendment also demonstrates that the "State convention of school directors" in the first sentence of section 410 was a convention sponsored by the State School Directors Association. This amendment also evidences legislative authorization to use taxpayer funds collected by school districts to pay the expenses of the Association.⁵

³ See footnote 1, *supra*.

⁴ Coincidentally the year of the Letter Advice from the Department of Justice discussed below.

o The Public School Code was totally rewritten in 1949, at which time section 410 of the old law became section 516 of the Public School Code of 1949, 24 P.S. § 5-516, which then provided, in relevant part:

The board of school directors of each district may appoint, from among their number, one delegate to any State convention or association of school directors, held within the Commonwealth Any such board may become a member of the State School Directors' Association, and may pay, out of the school funds of the district, any membership dues which may be assessed by the association at any State convention of school directors to defray the necessary expenses of maintaining the association and of holding the convention.

Thus, in 1949, with the exception of a possessive apostrophe in the name of the Association, the new Public School Code read exactly the same as the previous 1911 School Code, as amended in 1939, and continued to recognize the right of school boards to defray the costs of operating the unincorporated State School Directors' Association.

o By the Act of August 13, 1963, P.L. 768 (No. 385), the Public School Code was amended to read as it currently does, the relevant language providing:

Any such board may become a member of the Pennsylvania School Boards Association, Inc., and may pay out of the school funds of the district, any membership dues which may be assessed by the association at any State convention of school directors to defray the necessary expenses of maintaining the association and of holding the convention.

In summary, the above legislative history shows that initially there was a provision allowing the attendance of a school board delegate at a statewide, unnamed convention, of school directors. By 1939, a specific organization had been created, the State School Directors' Association, which school boards were authorized to join and fund with tax revenues. In 1963, the currently incorporated PSBA was recognized.

⁵ The preamble to the amendment states that it provides "that boards of school directors may become members of the State School Directors Association and bear a proportionate part of the expenses of such association." (Emphasis supplied.)

Jeffrey B. Clay
October 31, 2005
Page 5

Department of Justice Letter of Advice

The year 1939 was also significant in regard to this issue for another reason. In that year, although before the passage of the aforesaid amendment, the Department of Justice advised that the activities of the predecessor to PSBA fell within section 410 of the then-existing 1911 School Code so that its employees were qualified to be members of PSERS.

The Digest of Letters of Advice published by the former Commonwealth Department of Justice (now the Office of the Attorney General) contains the following advice dated February 1, 1939:

School Employes Retirement System—Case of Preston O. Van Ness: Mr. Van Ness as Secretary of the Pennsylvania School Directors Association is a full-time employee, gives all his time to matters connected with the public schools and is paid by funds contributed by the different school districts throughout the State from taxes collected for school purposes. His status might well be construed to be within the provisions of section 410 of the School Code.

As we have already seen, at the time the advice was given, section 410 of the 1911 School Code merely authorized the appointment and reimbursement of expenses of school directors to attend the "State convention or association of school directors held within the Commonwealth." The advice concluded that just as school board members fulfill their public duties on behalf of public schools by attending a convention of the School Directors Association, with reimbursement from taxpayer funds, the employees of that Association, who give all their time to matters connected with public schools and are paid with taxpayer funds, are likewise engaged in activities on behalf of public schools, and are qualified to be members of PSERS. This provision, as amended, is now, as we have seen, found with reference to PSBA in section 516 of the Public School Code of 1949, as amended, 24 P.S. §5-516.

In reliance on this Letter of Advice from the Department of Justice, the PSERS Board, presumably in 1939, determined that employees of the predecessor of PSBA are considered governmental employees for retirement purposes, a determination that has continued for 66 years.

The timing of the Letter of Advice in February of 1939 and the amendment in May of 1939 would hardly appear to be a coincidence, yet the relationship between the two is not totally obvious. It would be speculative to attempt to determine the complete relationship, and documentation is probably no longer available. Several things, however, are incontrovertible:

- o PSERS has relied on that advice since 1939 to include PSBA employees in its system.
- o In February of 1939, the Department of Justice provided support for PSERS to allow an employee of the predecessor of PSBA to become a member of PSERS because his activities were within the scope of what school directors were authorized to do.
- o Several months after this ruling had been made, the General Assembly dealt with the very section (410) of the 1911 School Code that the Department of Justice had relied upon and did nothing to overrule or change that advice. Indeed, by authorizing school directors not only to attend conventions of the predecessor of PSBA, but also to use school funds to pay for and defray the expenses of the predecessor of PSBA, the General Assembly actually confirmed that advice.⁶
- o The amendment specifically confirmed and sanctioned the payment of the expenses of the Association with taxpayer funds by the school districts – an action they had already been doing according to Department of Justice.

Previous Reviews

I have had the opportunity to review informal files regarding this issue to ascertain what previous advice may have been rendered on the subject. This question was raised and addressed by a Legal Opinion of this office dated April 29, 1997, in which we concluded that the Board's determination that employees of PSBA are eligible for membership in PSERS is a valid interpretation of the Retirement Code.⁷

⁶ See Tool Sales & Service Co. v. Commonwealth, 536 Pa. 10, 23, 637 A.2d 607, 614 (1993), where, in discussing a regulation, the Court stated: "Furthermore, the General Assembly has had almost a decade to reverse this regulation had it been contrary to the intent of the statute. The failure of the General Assembly to act is evidence that the regulation is not contrary to its intent. (Emphasis added).

⁷ I have reviewed other memoranda discussing the issue, but none of them rendered an actual opinion, nor did any contain the analysis reflected in this memorandum.

That opinion noted that the Retirement Code provides that generally all "school employees" are mandatory members of PSERS under 24 Pa. C.S. §8301(a). "School employee" is defined as any person "engaged in work relating to a public school for any governmental entity and for which work he is receiving regular remuneration as an officer, administrator or employee excluding, however, any independent contractor or a person compensated in a fee basis." 24 Pa. C.S. §8102. "Governmental entity," in turn, is defined to mean "[b]oard of school directors, board of public education, intermediate unit board of directors, area vocational-technical board, any governing board of any agency or authority created by them, and the Commonwealth. 24 Pa. C.S. §8102. (Emphasis added). Neither "agency" nor "authority" is defined in the Retirement Code.

The opinion defined the issue as whether PSBA is a governmental entity. It noted section 516 of the Public School Code, which authorizes school board membership in PSBA and payment of dues to PSBA from school district (tax) funds. It also noted the fact that the Legislature did not create PSBA such that it would become an agency or authority of the board of school directors. Nevertheless, the opinion concluded that since the PSERS Board had concluded in the past that the employees of PSBA met the definition of "school employees" under 24 Pa. C.S. §8102, because they were "engaged in work relating to a public school" for a "governmental entity," namely PSBA, as an agency or authority of public school board directors in the Commonwealth, this interpretation of the Board's own enabling legislation would be entitled to great weight and deference in the courts. As such, the opinion concluded that the interpretation that employees of PSBA are entitled to membership in PSERS would most likely be upheld. See Laurito v. Public School Employees' Retirement System, 606 A.2d 609 (Pa. Cmwlth. 1992); Smithkline Beckman Corp. v. Commonwealth, 482 A.2d 1344 (Pa. Cmwlth. 1984).

To this analysis, I would add that PSBA is clearly a "governing board . . . created by them" [i.e. boards of school directors], within the definition of "governmental entity" under 24 Pa. C.S. §8102. The question to be answered in determining whether PSBA is a "governmental entity" is, therefore, whether it also constitutes an "agency or authority" of boards of school directors, the last above-quoted words not being defined in the Retirement Code.

It seems clear that PSBA is not an authority, a term having a distinct meaning under the Municipality Authorities Act, 53 Pa. C.S. §5601, et seq.⁸

⁸ This Law, enacted in 2001, codified the Municipal Authorities Act of 1945, 53 P.S. §301, et seq.

PSBA, however, could be considered an "agency" under the ordinary sense of the word.⁹ Previous discussions appear to have focused on this word as referring to a state administrative agency. But there is no reason to make this assumption. Indeed, no school board has the power to create that type of agency – only a legislative body can create such an agency. Moreover, it would be contrary to the normal canons of statutory construction to conclude that the General Assembly referred to "agency" in the definition of "governmental entity" in a sense that could not exist.¹⁰ School boards cannot create administrative agencies; they do, however, have the power to create an agency in the form of an organization or corporation to which they delegate authority to speak for them and represent them before the executive, legislative and even judicial bodies in policy matters concerning school boards.¹¹

Thus, it is reasonable to conclude that PSBA is an "agency" of the school boards in the ordinary sense, but not an "administrative agency" in the statutory sense.¹²

⁹ "Agency" is defined in Webster's New Collegiate Dictionary as, inter alia, "a person or thing through which power is exercised or an end is achieved: - instrumentality an establishment engaged in doing business for another"

¹⁰ See Statutory Construction Act, 1 Pa. C.S. §1922 (1) ("That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.")

¹¹ In this connection, the purposes of PSBA as set forth in its Charter are instructive:

Section 1 - - To provide a medium for school boards, school directors, school board secretaries and business managers, and other related groups to come together and exchange information and views concerning the administration of the Commonwealth's public schools, including post-secondary schools when such institutions are operated as a part of the public school system.

Section 2 - - To secure united cooperation in handling school board problems and to endeavor to bring about improvement of the public schools at all levels by cooperation with other educational and professional agencies, including, but not limited to, other State Associations of School Boards and the National School Boards Association.

Section 3 - - To consider, and, whenever deemed advisable, take such action as seems most desirable on matters relating to education and school administration, whether initiated by this Association, by the General Assembly, by State Agencies, or by private individuals, associations or groups.

Section 4 - - To promote greater activity and higher efficiency on the part of all school boards in order to secure the best results in the progressive advancement, control and conduct of the public schools of the Commonwealth.

Section 5 - - To render assistance and advice to school boards and to members of school boards on school matters affecting them.

Jeffrey B. Clay
October 31, 2005
Page 9

Conclusion

Based on the above, I conclude that there is support for the conclusion, backed by over sixty years of practice, that employees of PSBA may be members of PSERS.

¹² I have also reviewed a letter to the editor of the Harrisburg Patriot-News in 2001, in which Thomas J. Gentzel, Executive Director of PSBA, observed that PSBA had been considered as a school employer for retirement purposes for more than 60 years. He also noted that a number of other states had acted in the same manner as Pennsylvania, declaring that employees of school board associations are eligible for membership in a public pension system. I have independently ascertained that there are several other states, (e.g. Oregon, South Dakota, Georgia, Colorado) that allow such membership, pursuant to analogous statutory authority.