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ARIZONA ATTORNEY GENERAL

August 23, 1949

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O. J. Eide, Chairman  
Public Employees' Retirement Fund  
State Auditor's Office  
Phoenix, Arizona

Dear Mr. Eide:

We have your request as a member of the Board of Trustees of the Public Employees' Fund of Arizona for an opinion concerning the employment by the Board at the present time of an actuary for the purpose of carrying out the various provisions of the public Employees' Retirement Act of 1948. You ask specifically:

"I, therefore, request your opinion as to whether the Board now may lawfully, (1) hire an actuary; or (2) accept the services of an actuary on the contingency that if and when funds become lawfully available, compensation will be made."

Section 17 of the Act provides general authorization for the appointment by the Board of both a secretary and an actuary.

As you are well aware there has been filed by this office on behalf of the Board of Trustees in the Superior Court of Maricopa County a declaratory judgment action (Board of Trustees of the Public Employees' Retirement Fund of Arizona vs. Ana Frohmler, as State Auditor of the State of Arizona) to determine what, if any, funds are presently available for the administrative expenses of carrying the Act into effect. The action will be handled as expeditiously as possible though it may become necessary to take an

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immediate appeal from the judgment of the Superior Court to the Supreme Court of Arizona. Upon the conclusion of this action the Board will know conclusively whether or not such funds are presently available. Until such time, however, as we have received a definite and final ruling, the issue is legally in doubt. We must, therefore, advise you, as a member of the Board, that in our opinion said Board cannot properly proceed and act upon the assumption that funds are presently available for the payment of administration expenses, including the salary of an actuary. The action being pending, the Board must abide by the court's decision.

Section 10-923 ACA 1939, as amended, (see 1947 Supplement) provides:

"Unauthorized obligation.-- No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment. Any obligation so raised in contravention of this act shall not be binding against the state but shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state. But every person incurring, or ordering or voting for the incurrence of such obligations, and his bondsmen, shall be jointly and severally liable therefor. Every payment made in violation of the provisions of this act shall be deemed illegal, and every official authorizing or approving such payment, or taking part therein, and every person receiving such payment, or any part thereof, shall be jointly and severally liable to the state for the full amount so paid or received."

Section 12-501 ACA 1939 provides:

"Officers and persons liable.--  
Whenever any person whose duty it is to approve, audit, allow or pay, claims or demands upon the state, shall approve, audit, allow or pay or consent to, or connive at, the approving, auditing, allowing, or paying of, any claim or demand against the state not authorized by law, such person, and the party in whose favor such claim or demand was made, shall be liable for any money thereby procured, and twenty (20) per cent additional thereon, and legal interest upon such payment from the date thereof."

See also: Sections 12-502--12-503 ACA 1939.

Section 17, of the Public Employees' Retirement Act of 1948, dealing with the appointment of a secretary and actuary, reads:

"The board shall employ and compensate a secretary, an actuary and such medical and other services as shall be required to transact the business of the fund, subject to any applicable state civil service regulations. All other expenses of the board necessary for the proper and efficient operation of the fund shall be paid at such rates and in such amounts as the board shall determine and approve."  
(Emphasis supplied)

This provision does not appear to give to the Board authority

to employ such persons without compensating them for all services performed; the only authority given is to employ and compensate and acceptance of such services by the Board upon the contingency that, if and when and only if and when funds become lawfully available would be a contravention of the only power granted. For the court might determine that no funds are presently available, and the legislature might choose to ignore the services performed and never appropriate funds to compensate such persons. It is to be further noted that Article 22, section 17 of the Arizona Constitution provides that all State officers shall be paid fixed and definite salaries.

In Killett v. Frehiller, 66 Ariz. 339, 128 P. 2d 457, the court held that authorization by law to a state agency to employ persons in the performance of agency duties does not, in itself, constitute a right to draw on the general fund. The court went on to say that payment to such persons can be made only if there is an actual and proper appropriation, and any obligations incurred in the absence of such are null and void rendering the officials incurring them liable on their bonds.

In 42 Am. Juv., Public Funds, Section 42, the following rule is stated:

"Authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation." (emphasis supplied)

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Such a contingent contract as is contemplated by your letter would, at the least we believe, morally obligate the State for the payment of compensation to the persons so hired in violation of the preceding rules and statutory provisions.

It is, therefore, our opinion that the applicable statutes and rules of law coupled with the pendency of the present action in the Superior Court legally precludes the Board of Trustees from hiring either a secretary or an actuary at the present time, either unconditionally upon definite salary or upon a "contingent" salary basis.

Yours very truly,

FRED O. WILSON  
Attorney General

RICHARD C. BRINEY  
Assistant Attorney General

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