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ATTORNEY GENERAL OPINION NO. 92- 154

Mr. Meredith Williams
Executive Secretary
Kansas Public Employees Retirement System
Capitol Tower, Suite 200
400 S.W. 8th Avenue
Topeka, Kansas 66603-3925

Re: State Boards, Commissions and Authorities--Public Employees Retirement Systems; Kansas Public Employees Retirement System--Retirement Fund; Management and Investment; Banking Institutions, Savings and Loan Associations, or Credit Unions

Synopsis: K.S.A. 1991 Supp. 74-4921, as amended by L. 1992, ch. 218, § 8, prohibits the board of trustees for the Kansas public employees retirement system (KPERS) from undertaking investments in any banking institution, savings and loan association, or credit union which would position the system as a shareholder or owner of such banking institution, savings and loan association, or credit union. K.S.A. 1991 Supp. 74-4921, as amended, does not prohibit the system from acquiring debt securities of a banking institution, savings and loan association, or credit union. The statute does not prohibit the board of trustees from investing in equity issues of non-banking financial institutions. Nor is the board of trustees prohibited under K.S.A. 1991 Supp. 74-4921, as amended, from investing in a parent company, a subsidiary of which is a banking institution,

savings and loan association, or credit union.
Cited herein: K.S.A. 1991 Supp. 74-4921, as
amended by L. 1992, ch. 218, § 8.

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Dear Mr. Williams:

As executive secretary for the Kansas public employees retirement system (KPERS), you request our opinion regarding the investment authority of the board of trustees for KPERS. Specifically, you ask:

1. Whether KPERS may make an investment in the debt securities of a banking institution, savings and loan association, or credit union;
2. Whether KPERS may make an investment in the equity issues of a non-banking financial institution which does not accept deposits, such as finance companies, insurance companies, brokerage firms, mortgage loan servicers, student loan originators, mutual fund advisor firms, and investment banking firms; and
3. Whether KPERS may make an investment in the equity issues of major corporations which, as an adjunct to their major activities, own a banking institution, savings and loan association, or credit union.

K.S.A. 1991 Supp. 74-4921, as amended by L. 1992, ch. 218, § 8, sets forth the obligations of the board of trustees for KPERS regarding the Kansas public employees retirement fund (fund). Pursuant to subsection (3) of the statute, "[m]oneys in the fund shall be invested and reinvested to achieve the investment objective which is preservation of the fund to provide benefits to members and member beneficiaries, as provided by law and accordingly providing that the moneys are as productive as possible, subject to the standards set forth. . . ." Subsection (5)(c) then provides that "the board shall not invest or reinvest moneys of the fund in any banking institution, savings and loan association or credit union which positions the system as a shareholder or owner of such banking institution, savings and loan association or credit union."

DEBT SECURITIES

The interpretation of a statute is a matter of law and it is the function of the court to interpret the statute to give it the effect intended by the legislature. Todd v. Kelly, 251 Kan. 512, 515 (1992). The fundamental rule of statutory construction is that the intent of the legislature governs when that intent can be ascertained from the statute. Steele v. City of Wichita, 250 Kan. 524, 529 (1992). In determining legislative intent, courts are not limited to a mere consideration of the language employed but may properly look into the historical background of the enactments, the circumstances attending and subsequent to its passage, the purposes to be accomplished, and the effect the statute may have under the various constructions suggested. Id. If the act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. Flour Mills of America v. Burrus Mills, 174 Kan. 709, 716 (1953).

K.S.A. 1991 Supp. 74-4921 was amended twice during the 1992 legislative session. The amendment set forth in L. 1992, ch. 218, § 8 was included in a bill which: expands the number of members for the board of trustees and establishes qualifications for those members; establishes the joint committee on pensions, investments and benefits; sets forth standards for records which are to be maintained by KPERS; authorizes employment of additional employees; and obligates the board of trustees to develop and adopt plans regarding the strategies and goals of the system. L. 1992. ch. 321, § 9 is part of an enactment containing 34 sections, which address: normal retirement dates under the system; benefits payable to a surviving spouse who has remarried and children who are married; and the statute of limitations for crimes against KPERS. Neither amendment was part of an act passed with reference to a particular trade, business, or transaction. Therefore, the words are to be given their natural and ordinary meaning. House v. American Family Mutual Ins. Co., 251 Kan. 419, 423 (1992).

K.S.A. 1991 Supp. 74-4921, as amended, prohibits the board of trustees for KPERS from investing moneys of the fund in such a manner as to position KPERS as a "shareholder or

owner" of a banking institution, savings and loan association, or credit union. A shareholder or stockholder is "[a] person who owns shares of stock in a corporation or joint-stock company," Black's Law Dictionary 1272 (1979), with each share representing a unit of interest in a corporation, entitling the shareholder to a proportionate part of the property or its proceeds when distributed. In re Estate of Mellott, 1 Kan.App.2d 709, 718 (1977). An owner is "[t]he person in whom is vested the ownership, dominion, or title of property; proprietor." Black's Law Dictionary 996 (1979). The return earned by the system as a shareholder or owner is dependent upon the profitability of the corporation.

Conversely, a debt security is "[a]ny form of corporate security reflected as debt on the books of the corporation in contrast to equity securities such as stock; e.g. bonds, notes and debentures are debt securities." Black's Law Dictionary 365 (1979). Such items are an obligation upon the corporation to pay certain moneys at a later date. Fidelity Savings State Bank v. Grimes, 156 Kan. 55, 57 (1942) (a note is a promise to pay); State ex rel. v. American Savings Stamp Co., 194 Kan. 297, 301 (1965) (a bond is evidence of an indebtedness; a promise to pay cash); Black's Law Dictionary 361 (1979) (a debenture is a promissory note or bond backed by the general credit of a corporation).

"The essential difference between a stockholder and a creditor is that a stockholder invests in the corporate venture and takes the risk of loss in order to share in the profit; and the creditor does not intend to take such risks, but merely lends his capital to others who do take them" Security Finance and Loan Company v. Koehler, 210 F.Supp. 603, 606 (D.C. Kan. 1962).

K.S.A. 1991 Supp. 74-4921 was amended in light of the investment by KPERS in Home Savings. It is the risk taken by a shareholder or owner which the legislature intended to limit. Therefore, the legislature enacted legislation which expressly precludes the board of trustees of KPERS from positioning the system as a shareholder or owner of a banking institution, savings and loan association, or credit union. Debt securities do not involve such risk nor do they position the holder of such securities as a shareholder or owner of the financial institution. K.S.A. 1991 Supp. 74-4921, as

amended, does not prohibit the system from acquiring debt securities of a banking institution, savings and loan association, or credit union.

NON-BANKING FINANCIAL INSTITUTIONS

As noted above, words and phrases used in a statute should be construed according to context and the approved usage of the language, which means that words in common use are to be given their natural and ordinary meaning. House, 251 Kan. at 423.

When a statute is clear and unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. State v. Coley, 236 Kan. 672, 675 (1985). One of the more common rules of statutory interpretation is that the mention or inclusion of one thing implies the exclusion of others. State v. Wood, 231 Kan. 699, 701 (1982). K.S.A. 1991 Supp. 74-4921, as amended, clearly prohibits certain investments in "any banking institution, savings and loan association or credit union." By expressly setting forth these types of financial institutions in the prohibition regarding investments which position KPERS as a shareholder or owner, the legislature has impliedly excluded other financial institutions from the prohibition. Therefore, K.S.A. 1991 Supp. 74-4921, as amended, does not prohibit the board of trustees for KPERS from investing in equity issues of non-banking financial institutions.

MAJOR CORPORATIONS

Before we can address the remaining issue you raise, it is necessary to set forth assumptions upon which we are relying to address the issue. It is assumed that the major corporation in which KPERS wishes to invest is a parent company of a banking institution, savings and loan association, or credit union. It is also assumed that the parent company and the subsidiary are operating as separate entities, and that the parent company is not itself a banking institution, savings and loan association, or credit union.

It is noted that K.S.A. 1991 Supp. 74-4921, as amended, expressly prohibits the board from investing "in any banking institution, savings and loan association, or credit union" such that the system is "a shareholder or owner of such banking institution, savings and loan association or credit union." The major corporation in which KPERS wishes to

invest, as a parent company of a banking institution, savings and loan association, or credit union, owns more than 50% of the voting shares of the banking institution, savings and loan association, or credit union, and has working control of such subsidiary through its stock ownership. Black's Law Dictionary 1004 (1979). Quoting Quarles v. Faqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974), the United States District Court for the district of Kansas stated in Hoffman v. United Telecommunications, Inc., 575 F.Supp. 1463 (Kan. 1983) that "a holding or parent company has a separate corporate existence and is treated separately from the subsidiary in the absence of circumstances justifying disregard of the corporate entity. . . ." Hoffman, 575 F.Supp. at 1478. The court further stated:

"The fact that one corporation may own all the stock of another and may further select from its own directors and officers a majority of all the directors of the other corporation, or the fact that a parent finances the subsidiary, is not sufficient, standing alone, to warrant disregard of the corporations as separate entities." Id.

Also, it is provided in 18A Am. Jur. 2d Corporations §749 (1985) that:

"When one purchases or acquires stock in a corporation, no matter at what time, he acquires a fractional or proportional interest in the capital stock, assets, profits, and liabilities of the corporation, since each share represents a distinct and undivided share or interest in the common property of the corporation. However, because of the separate legal existence of a corporation, the corporate property is vested in the corporation itself and not in the stockholders, even though the stockholders may be regarded as the equitable owners of the property of a corporation or as the real owners in the economic sense. Stated another way, when a corporation owns property, the ownership of such property cannot be attributed to the shareholders individually without

assailing the validity of the corporation directly. Thus, a purchase of stock in a corporation is not a purchase of the corporate assets, just as a sale of the stock of a corporation is not a sale of the property and assets of the corporation itself. Similarly, transfer of the stock of a parent corporation does not affect the ownership of assets of a subsidiary. Shareholders have the right to select those who will manage the corporate affairs, to share in the corporation's earnings or profits when they are distributed as dividends, and to participate in a distribution of the net assets of the corporation upon its dissolution, but they are not the owners in any legal sense of any part of the corporation's property." (Emphasis added.)

See Voran v. Wright, 129 Kan. 601, 612-13 (1930).

Therefore, based on the assumptions previously stated, the investment in the parent company (major corporation) would be an investment in an entity separate from the banking institution, savings and loan association, or credit union. An investment in the parent company would not constitute an investment in the banking institution, savings and loan association, or credit union, nor would it position the system as a shareholder or owner of the banking institution, savings and loan association, or credit union. Applying those rules of statutory construction previously noted, it is clear that the board of trustees for KPERS is not prohibited under K.S.A. 1991 Supp 74-4921, as amended, from investing in a parent company, a subsidiary of which is a banking institution, savings and loan association, or credit union.

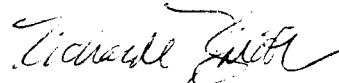
In review, K.S.A. 1991 Supp. 74-4921, as amended, prohibits the board of trustees for KPERS from undertaking investments in any banking institution, savings and loan association, or credit union which would position the system as a shareholder or owner of such banking institution, savings and loan association, or credit union. K.S.A. 1991 Supp. 74-4921, as amended, does not prohibit the system from acquiring debt securities of a banking institution, savings and loan association, or credit union. The statute does not prohibit the board of trustees from investing in equity issues of

non-banking financial institutions. Nor is the board of trustees prohibited under K.S.A. 1991 Supp. 74-4921, as amended, from investing in a parent company, a subsidiary of which is a banking institution, savings and loan association, or credit union.

Very truly yours,



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