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Opinion No. 12-75

The Other Post-Employment Benefit Investment Trust Act of 2006

QUESTIONS

1. Is the Other Post-Employment Benefit Investment Trust Act of 2006, codified at Tenn. Code Ann. §§ 8-50-1201 to -1207 (hereinafter "the OPEB Act"), the only statutory authority that permits county school boards to establish an OPEB investment trust?

2. How may funds in an OPEB trust created under the OPEB Act be invested?

3. May the Tennessee School Boards Association ("TSBA") administer an OPEB trust created under the OPEB Act?

4. Does the Interlocal Cooperation Act authorize county school boards to collectively establish an OPEB trust under the OPEB Act?

5. May a single county school board, or two or more county school boards, contract with TSBA to create and operate an OPEB trust?

OPINIONS

1. The OPEB Act does not expressly preempt other statutes that may allow one or more Tennessee political subdivisions to establish trusts similar to the ones referenced in OPEB. Thus a private or public act could authorize a particular school board to create an OPEB trust without complying with the OPEB Act. But, absent such express authority, it appears the OPEB Act was intended to be the only statutory authority under which a county school board may create an investment trust for the purpose of pre-funding non-pension post-employment benefits accrued by employees of the political subdivision (hereinafter an "OPEB trust"). For this reason, absent the existence of any conflicting authority, any OPEB trust created by a county school board must comply with the OPEB Act.

2. Funds in an OPEB trust created under the OPEB Act must be invested as required by Tenn. Code Ann. § 8-50-1205(1).

3. Yes.

4. Yes. Under the OPEB Act, the OPEB trust to be created must be approved by resolution by each individual school board and by the state funding board. Once each school board seeking to collectively create an OPEB trust has obtained the requisite approvals, the school board may enter an interlocal agreement with other schools under the Interlocal Cooperation Act to jointly exercise their statutory powers to administer an OPEB trust. Any such trust must comply with the requirements of the OPEB Act.

5. Yes.

ANALYSIS

1. This opinion concerns the authority of a Tennessee county school board, acting individually or collectively with other school boards, to create a trust regarding future governmental liability for certain defined non-pension public employee benefits. The primary question presented is whether Tennessee law permits county school boards to collectively band together to create a single OPEB trust to fund these board's future liability for non-pension public employee benefits and, if so, what Tennessee law controls how such action may be accomplished.

Specifically, the trusts in question are governed by the Other Post-Employment Benefit Investment Trust Act of 2006, which is codified at Tenn. Code Ann. §§ 8-50-1201 to -1207 (the "OPEB Act"). The preamble to the OPEB Act sets forth the purposes of the Act as follows:

> WHEREAS, the Governmental Accounting Standards Board issued Statements 43 and 45, which set forth standards on accounting and reporting for post-employment benefits (other than pensions) by governmental entities; and
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> WHEREAS, these new standards will require political subdivisions of the State of Tennessee to account for such post-employment benefits on an actuarial basis during an employee's career rather than on a pay-as-you-go basis during retirement; and
>
> WHEREAS, it is beneficial to the state to assist Tennessee political subdivisions that offer other post-employment benefits by authorizing such subdivisions to create an investment trust whereby the political subdivisions may begin financing those benefits in advance. . . .

2006 Tenn. Pub. Acts 771.

To accomplish these purposes, the OPEB Act grants Tennessee political subdivisions the following authority:

> A political subdivision may, by resolution legally adopted and approved by its chief governing body, establish an investment trust for the purpose of pre-funding other post-employment benefits accrued by employees of the political subdivision, to be paid as they come due in accordance with the arrangements

> between the employers, the plan members and their beneficiaries. *This authorization shall be subject to the following conditions:*
>
> (1) The chief governing body must establish a written plan of the post-employment benefits provided;
>
> (2)(A) The investment committee of the political subdivision must adopt, in writing, an investment policy authorizing how assets in the trust may be invested. The policy shall not authorize assets in the trust to be invested in any instrument, obligation, security, or property that would not constitute a legal investment for assets of Tennessee domestic life insurance companies;
>
> (B) Notwithstanding subdivision (2)(A), the investment committee of a political subdivision may adopt, in writing, an investment policy authorizing assets in the trust to be invested and managed in accordance with the investment policy the political subdivision utilizes to manage pension assets; provided, however, that the pension fund management must conform to the Tennessee Uniform Prudent Investor Act of 2002, compiled in title 35, chapter 14;
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> (3) The trust must conform to all applicable laws, rules and regulations of the internal revenue service, if any. Notwithstanding any provision of subdivision (4) to the contrary, it shall be the sole responsibility of the political subdivision to ensure that the trust conforms to the laws, rules and regulations of the internal revenue service; and
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> (4) The trust document must be submitted to the state funding board for approval.

Tenn. Code Ann. § 8-50-1203 (emphasis added).

> Under the OPEB Act, the term "political subdivision" means:
>
> any Tennessee local governmental entity, including, but not limited to, any municipality, metropolitan government, county, utility district, school district, public building authority, and development district created and existing pursuant to the laws of Tennessee, or any instrumentality of government created by any one (1) or more of the named local governmental entities or by an act of the general assembly[.]

Tenn. Code Ann. § 8-50-1202(2). Thus a county school board as a "local education agency" is a local governmental entity authorized to create an OPEB trust under the OPEB Act. *See* Tenn. Code Ann. § 49-1-103(2) ("local education agency" includes a county school system).

The term "other post-employment benefits" or "post-employment benefits" that can be placed in an OPEB trust means:

> non-pension benefits paid on behalf of former employees or the former employees' beneficiaries after separation from service. The benefits may include,

> but shall not be limited to, medical, prescription drugs, dental, vision, hearing, Medicare part B or part D premiums, life insurance, long-term care, and long-term disability[.]

Tenn. Code Ann. § 8-50-1202(1). Tenn. Code Ann. § 8-50-1204 addresses the conditions required of an OPEB trust as follows:

> (a) The assets of any trust created under this part shall be irrevocable, and shall be preserved, invested and expended solely pursuant to and for the purposes of this part and shall not be loaned or otherwise transferred or used for any other purpose. The assets of the trust shall be expended solely to:
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> > (1) Make payments for other post-employment benefits pursuant to and in accordance with terms of the political subdivision's respective post-employment benefit plan; and
> >
> > (2) Pay the cost of administering the trust.
>
> (b) Any investment trust so created shall have the powers, privileges and immunities of a corporation; and all of its business shall be transacted, all of its funds invested, and all of its cash and securities and other property held in trust for the purpose for which received.
>
> (c) Notwithstanding any law to the contrary, all assets, income and distributions of the investment trust shall be protected against the claims of creditors of the political subdivisions, plan administrators, and plan participants, and shall not be subject to execution, attachment, garnishment, the operation of bankruptcy, the insolvency laws or other process whatsoever, nor shall any assignment thereof be enforceable in any court.

The annual report of an OPEB trust is subject to audit by the Comptroller of the Treasury. Tenn. Code Ann. § 8-50-1206. With the Comptroller's prior approval, the audit may be performed by a licensed independent public accountant. *Id.* The contract between the political subdivision and the accountant must be on a form prescribed by the Comptroller. *Id.*

The recitals to the OPEB Act provide that Act is intended to address new accounting standards issued by the Governmental Accounting Standards Board. 2006 Tenn. Pub. Acts 771. Accordingly, the Act authorizes a political subdivision to create an OPEB trust subject to the specific statutory standards outlined by the Act.

The Act does not state that it represents the exclusive method by which a political subdivision may create a trust for non-pension post-employment benefits. It is, therefore, possible that some other private or public act could authorize a particular entity to create such a trust without complying with the OPEB Act. *See Brundage v. Cumberland County*, 357 S.W.3d 361, 364-65 (Tenn. 2011) (stating that when construing a statute courts should not unduly expand its coverage beyond its intended scope). This Office, however, is aware of no other statutory authority permitting a political subdivision of the State of Tennessee to create an OPEB

trust. Absent such authority, the OPEB Act represents the sole statutory authority governing how a county school board may establish an OPEB trust, and such a trust may only be created for the purpose of funding non-pension public employee benefits pursuant to the terms of the OPEB Act. Local boards of education are creatures of state statute, and their authority is limited to that explicitly bestowed upon them, or necessarily implied. *See Southern Constructors, Inc. v. Loudon County Bd. of Education*, 58 S.W.3d 706, 710 (Tenn. 2001) (school board's statutory authority to submit a construction contract to arbitration was implied by the express statutory authority to enter into construction contracts in Tenn. Code Ann. § 49-2-203). If there is any doubt as to whether a local governmental entity, such as a board of education, possesses a particular authority, courts should resolve that doubt against the existence of the authority. *See id. See also Arnwine v. Union County Board of Education*, 120 S.W.3d 804, 808 (Tenn. 2003) (local school board has no authority to enter into a multi-year contract with an assistant superintendent); *Allmand v. Pavletic*, 292 S.W.3d 618, 625 (Tenn. 2009) (municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes).

Thus, if county school boards want to collectively create and administer an OPEB trust, they would have to comply with the OPEB Act and enter into an interlocal agreement under the Interlocal Cooperation Act, codified at Tenn. Code Ann. §§ 12-9-101 to -112. To accomplish this goal, the county school boards would initially develop a proposed OPEB trust that conforms with the OPEB Act. As part of this process, the participating school boards would name the proposed trustees of the trust, as well as the individual or entity who would administer the trust (the opinion request notes the boards may want the Tennessee School Boards Association to administer the trust). The agreement for administration of trust should be drafted with the proposed OPEB trust document, so that both could be submitted for review to the appropriate authorities for approval. The OPEB Act specifically requires that this proposed trust be submitted to the state funding board for approval, Tenn. Code Ann. § 8-50-1203(4), and that the proposed trust be approved by resolution by the chief governing body of each school board, Tenn. Code Ann. § 8-50-1203. Once these requisite approvals are obtained, then the school boards can execute an interlocal agreement under the Interlocal Cooperation Act to proceed to establish the single proposed trust for the purpose of pre-funding the defined non-pension post-employment benefits accrued by the employees of all the school boards that form this trust. Each school board's contributions must be appropriately accounted for and each school board's portion of the total investment identified so that the benefits due each school board's employees can be ascertained. *See* Tenn. Code Ann. § 8-50-1205. The audits required by Tenn. Code Ann. § 8-50-1206 would confirm that such information is maintained.

2. The OPEB Act specifically authorizes political subdivisions to create OPEB trusts under Tenn. Code Ann. § 8-50-1203, and Tenn. Code Ann. § 8-50-1205(1) limits the investments of the funds of OPEB trusts to "any instrument, obligation, security, or property that constitutes legal investments, as provided in the investment policy adopted pursuant to [Tenn. Code Ann.] § 8-50-1203(2)."

3. The third question is whether the Tennessee School Boards Association ("TSBA") could administer this trust for participating school boards. The TSBA is a non-profit corporation chartered in accordance with general corporate law. TSBA website, *located at*

http://new.tsba.net/. The TSBA's constitution recites that the entity was formed and operates for charitable purposes under Section 501(c)(3) of the Internal Revenue Code. *Id.*, TSBA Constitution, Art. II, § 12. All members of county, city, and special school district boards of education that pay the annual membership service fee are voting members of the TSBA. *Id.*, Art. IV. TSBA has the power to accomplish any purposes approved by its membership at the TSBA annual meeting or any called meeting by the TSBA Board of Directors. *Id.*, Art. II, § 11. Major policies are adopted by resolutions approved by the majority of the delegates present in annual meetings of the delegate assembly. *Id.*, Art. III. The Board of Directors includes TSBA officers, the executive director, nine district directors, the chair of the Tennessee Legislative Network and up to three additional members selected by the board of directors. *Id.*, Art. VII.

Tennessee statutes recognize the TSBA as the "organization and representative agency of the members of school boards of this state." Tenn. Code Ann. § 49-2-2001(a). Tenn. Code Ann. § 49-2-2001 further acknowledges and encourages the TSBA's role in training and coordinating school board activities. These provisions specifically state:

> (b)(1) The commissioner of education, the department of education, the state board of education and the boards of education of counties, cities and special school districts are authorized and empowered to cooperate with the Tennessee school boards association in its in-training programs for school board members and in encouraging and fostering cooperation among the school boards of this state.
>
> (2) Any board of education is authorized to become affiliated with the Tennessee school boards association.
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> (3) The various boards of education are authorized to use the organization of the Tennessee school boards association in coordinating the policies, control and management of the schools under their respective jurisdictions.
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> (c) Membership dues and necessary traveling expenses of school board members and directors of schools incurred in attending meetings of the Tennessee school boards association may be paid as other expenses are paid by boards of education.
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> (d) The Tennessee school boards association is authorized to receive funds in the form of dues from its members and contributions from individuals, organizations and agencies for the purposes of carrying on its program.

Tenn. Code Ann. § 49-2-2001(b) - (d).

Tennessee law also charges the TSBA to perform numerous duties for its member school boards, including (1) developing models of ethical standards for school districts (Tenn. Code Ann. § 8-17-105(a)), (2) selecting a representative of local school districts to serve on the Local Education Insurance Committee (Tenn. Code Ann. § 8-27-301(a)(1)), (3) educating school board members about the open meetings laws (Tenn. Code Ann. § 8-44-111(b)), (4) helping to coordinate the availability of public school facilities for other purposes (Tenn. Code Ann. §§ 11-21-108 & 11-24-110)), (5) participating in the selection of a list of persons to serve as members

of the state Catastrophic Injuries Fund Commission (Tenn. Code Ann. § 29-20-408(a)(1)), and (G) consulting with the State Board of Education in developing a standard form for collection of statistics regarding zero tolerance violations in school systems (Tenn. Code Ann. § 49-6-4216(d)(1)).

Based upon a review of the aforementioned information, the TSBA possesses ample authority to administer an OPEB trust for one or more county school boards if it is so authorized by TSBA membership. Of course TSBA would be required as administrator of an OPEB trust to comply with all requirements of the OPEB Act. Finally, the trustees of the trust would be named by the participating school boards, and not TSBA, and this Office suggests such trustees should include representatives of the participating school boards to ensure appropriate oversight of the trust.

4. County school boards, as public agencies, possess the authority to enter into an agreement under the Interlocal Cooperation Act ("ICA"), codified at Tenn. Code Ann. §§ 12-9-101 to -112, to collectively form an OPEB trust for the benefit of all participating county school boards and to appoint the TSBA as the administrator of this trust. This Office is advised that the purpose of the proposed OPEB trust agreement is to allow members collectively to pre-fund the liability associated with other post-employment benefits and thereby avoid the negative impact on credit ratings and the cost of issuing debt. Membership in the trust will be open to all members of the TSBA and to non-TSBA members and other governmental entities at the discretion of the trustees of the trust.

The proposed trust agreement also will rely upon the ICA as the applicable authority which permits public entities, including school boards, to collectively enter into the trust agreement. Tenn. Code Ann. § 12-9-104(a)(1) of the ICA provides in relevant part:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state . . . may be exercised and enjoyed jointly with any other public agency of this state having the power or powers, privilege or authority. . . . The authority for joint or cooperative action of political subdivisions shall apply to powers, privileges or authority vested in, funded by, and/or under the control of their governing bodies and relative to which the governing bodies may make other types of contracts.

Thus any agreement created under the ICA would be entered into by two or more "public agencies." *Id. See also* Tenn. Code Ann. § 12-9-104(b) (stating that any two or more "public agencies" may enter into agreements with one another for joint action). The ICA lists specific matters that a joint contract under the statute must address, including "[t]he precise organization, composition and nature of any separate legal or administrative entity or entities created thereby, which may include, but is not limited to, a corporation not-for-profit, together with the powers delegated to such a corporation." Tenn. Code Ann. § 12-9-104(c)(2). Under Tenn. Code Ann. § 12-9-111, any interlocal agreement by local government entities creating a joint venture must be filed in the Comptroller's Office within ninety days of its execution. The term "local government entity" means:

> any city, town, municipality, county, including any county having a metropolitan form of government, local education agency, development district, utility district, human resource agency or other political subdivision of this state[.]

Tenn. Code Ann. § 12-9-103(1). The term "local government joint venture entity" means:

> any entity created pursuant to this chapter, including, but not limited to, a self-insurance pool, trust, joint venture, nonprofit organization, or any other type of organization that is sponsored, owned, operated, or governed by two (2) or more local government entities as a separate and specific activity[.]

Tenn. Code Ann. § 12-9-103(2). The ICA defines "public agency" to mean:

> (A) Any political subdivision of this state;
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> (B) Any private incorporated fire department and industrial fire department not supported by public funds or which are only partially supported by public funds;
>
> (C) Any incorporated rescue squad that is not supported by public funds or that is only partially supported by public funds;
>
> (D) Any agency of the state government or of the United States; and
>
> (E) Any political subdivision of another state[.]

Tenn. Code Ann. § 12-9-103(3). The terms "political subdivision" and "agency of the state government" under Tenn. Code Ann. § 12-9-103(3) are not further defined by the ICA.

The ICA, thus, authorizes public agencies to agree to exercise their powers jointly. A county school board as a political subdivision of Tennessee is a "public agency" under Tenn. Code Ann. § 12-9-103(3) of the ICA. *See* Tenn. Code Ann. § 8-50-1202(2) (for purposes of the OPEB Act a "political subdivision" includes a Tennessee local governmental entity such as a school district). Under the ICA, each public agency must be legally authorized by some other statute to exercise the powers accorded the jointly created agency. Tenn. Code Ann. § 12-9-104(a)(1). A county school board as a "political subdivision" is authorized to create an OPEB trust under the OPEB Act. *See* Tenn. Code Ann. § 49-1-103(2) ("local education agency" includes a county school system). The OPEB Act does not specify or limit who may be appointed to serve as trustees of an OPEB trust. *See* Tenn. Code Ann. § 8-50-1203. Furthermore, the chief governing body of the county school board in creating an OPEB trust is authorized to "contract for the provision of all or any part of the services necessary for the management and operation of the investment trust." Tenn. Code Ann. § 8-50-1205(2). Accordingly, a county school board could appoint TSBA personnel to serve as trustees for an OPEB trust created under the OPEB Act. County school boards also could exercise this power jointly under the ICA. *See* Tenn. Code Ann. § 12-9-104(a)(1). But, as discussed above, absent the existence of express statutory authority to the contrary, the OPEB Act is the sole statutory authority under which a county school board may create an OPEB trust. Thus, any OPEB trust

jointly created by county school boards under the ICA must comply with the requirements of the OPEB Act.

5. The final question is whether a county school board, or county school boards acting jointly, may contract with the TSBA to "create and operate" an OPEB trust. Initially, TSBA cannot itself create an OPEB trust for the benefit of a county school board's employees. That trust must be established by appropriate resolution of the county school board whose employees will be benefited by the trust and approved by the state funding board. *See* Tenn. Code Ann. § 8-50-1203. However, once a county school board acts to establish such a trust, the school board is granted broad authority to contract with a third party, including the TSBA, to provide all or any part of the services necessary for the management and operation of the trust. *See* Tenn. Code Ann. § 8-50-1205(2). Furthermore, through the creation of an appropriate ICA agreement, county school boards can act collectively to create a single trust administered by TSBA so long as each school board enacts the appropriate authorizing resolution required by Tenn. Code Ann. § 8-50-1203 and obtains the approval of the trust document by the Tennessee Funding Board under Tenn. Code Ann. § 8-50-1203(4). *See* Tenn. Code Ann. § 12-9-104.

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