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FILE NO. 91-046

STATE MATTERS:

Use of Appropriations for Pick Up
of Employee Retirement Contributions

Honorable Jim Edgar
Governor
State House, Room 207
Springfield, Illinois 62706

Dear Governor Edgar:

I have your letter wherein you inquire whether a State agency may "pick up" and pay employee retirement contributions for its employees from an appropriation line item for personal services, when no separate appropriation has been made to the agency for that purpose. In addition, you have inquired whether personal services appropriations may be used by an agency to make employee retirement contributions in the event that the agency's specific appropriation for such contributions

is insufficient to meet the full cost thereof. For the reasons hereinafter stated, it is my opinion that appropriations for personal services may properly be used by a State agency to pay employee retirement contributions, either in circumstances in which there is no separate appropriation therefor or in which the separate appropriation is inadequate to meet those obligations.

Since 1981, State agency employers have been permitted to "pick up" employee pension contributions to all five State retirement systems. (See Ill. Rev. Stat. 1989, ch. 108 1/2, pars. 2-126.1, 14-133.1, 15-157.1, 16-152.1, 18-133.1.) Contributions which are "picked up" by an employer, pursuant to section 414(h)(2) of the Internal Revenue Code (26 U.S.C. § 414(h)(2)), are excluded from the employee's gross income for tax purposes, until distributed. The pick up of such contributions has heretofore been accomplished by a reduction in the cash salary of each employee. As part of the Fiscal Year 1992 budget process, however, it was determined to accomplish the pick up without commensurate salary reduction in lieu of providing employee salary increases. Accordingly, separate line item appropriations for this purpose were made to many State agencies. (See Public Act 87-105, effective July 31, 1991.)

Related amendments to the State Finance Act were made by Public Act 87-14, effective July 24, 1991. Section 13.2 of

the State Finance Act (Ill. Rev. Stat. 1989, ch. 127, par. 149.2) was amended to prohibit any agency which receives a separate appropriation for payment of employee retirement contributions from transferring funds from that appropriation to any other line item, and further, to require that when any such agency transfers funds into its personal services line item, it make a corresponding transfer into the employee retirement contributions line item. Other amendments were made to section 14 of the State Finance Act (Ill. Rev. Stat. 1989, ch. 127, par. 150) and to section 14-133.1 of the Pension Code. (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 14-133.1.)

The purposes for which funds from a personal services appropriation line item may be expended are set forth in section 14 of the State Finance Act. Section 14, as amended by Public Act 87-14, provides, in part:

"The item 'personal services', when used in an appropriation act, means the reward or recompense made for personal services rendered for the State by an officer or employee of the State or of an instrumentality thereof, or for the purpose of Section 14a of this Act, or any amount required or authorized to be deducted from the salary of any such person under the provisions of Section 30c of this Act, or any retirement or tax law, or both, or deductions from the salary of any such person under the Social Security Enabling Act or deductions from the salary of such person pursuant to 'An Act relating to the deduction from salaries or wages of State officers and employees of amounts of money designated by them for payment to the United Fund or other similar organization', approved August 21, 1961, as heretofore and hereafter amended.

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Public Act 87-14 also added a new final paragraph to section 14, which specifically permits employee retirement contributions to be paid from personal services appropriations when trust funds or Federal funds are the funding source. This new paragraph, however, is not applicable to expenditures from other, general funding sources.

The words "reward or recompense made for personal services rendered for the State" are expansive enough to include payments made on behalf of an employee to the employee's retirement system. Indeed, section 14 expressly permits the payment of amounts authorized to be deducted from salary pursuant to any retirement law from a personal services line item appropriation. This comports with the provisions of the Illinois Pension Code (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 1-101 et seq.), which treat retirement contributions as earnings of State employees.

Section 14-133.1 (Ill. Rev. Stat. 1989, ch. 108 1/2, par. 14-133.1) of the Illinois Pension Code, which pertains to the State Employees Retirement System (SERS), provides, in part:

"Each department shall pick up the employee contributions required by Section 14-133 for all compensation earned after December 31, 1981, and the contributions so picked up shall be treated as employer contributions in determining tax treatment under the United States Internal Revenue Code * * *. The department shall pay these employee contributions from the same source of funds which is used in paying earnings to the employee. The department may pick up these

contributions by a reduction in the cash salary of the employee or by an offset against a future salary increase or by a combination of a reduction in salary and offset against a future salary increase. If employee contributions are picked up they shall be treated for all purposes of this Article 14 in the same manner and to the same extent as employee contributions made prior to the date picked up." (Emphasis added.)

Public Act 87-14 amended the underscored sentence of section 14-133.1 by changing the phrase "same source of funds" to "same fund". Similar provisions are applicable to each of the other State pension systems (see Ill. Rev. Stat. 1989, ch. 108 1/2, pars. 2-126.1, 15-157.1, 16-152.1, 18-133.1), although those sections were not amended by Public Act 87-14, and continue to provide that employee contributions are to be paid from the same source of funds which is used to pay earnings to the employee.

Under the pertinent provisions of the Pension Code, State agencies have been authorized, since 1981, to make employee retirement contributions by an offset against a salary increase and from the same source of funds from which salaries have been paid. The only available source of funds, prior to the current fiscal year, would have been personal services appropriations. Public Acts 87-14 and 87-105 now require that certain agencies pay the employee contributions as an offset against a salary increase, and provide, in most cases, a particular appropriation from which the payments are to be made, which cannot be used for any other purpose. Thus, with

respect to those agencies, payments which had previously been permissive have now been made mandatory. It is my opinion that the General Assembly, in so providing, has not rescinded the permissive authority of agencies for which specific appropriations were not made to pay employee contributions from personal services appropriations.

The amendment to section 14-133.1 of the Pension Code, changing the phrase "same source of funds" to "same fund", was apparently intended to accommodate the payment of employee retirement contributions from separate appropriations rather than from personal services line item appropriations only, since "source of funds" could be construed as limiting the source of retirement contributions to the same appropriation line from which salaries are paid. The use of the term "same fund" will permit the payment to be made from a separate appropriation from the same treasury fund from which employees' salaries are paid. This is evident in the provisions of Public Act 87-105, which make the separate appropriations to each agency by fund only, rather than by agency division as is done in most appropriations Acts. The amended language, however, was clearly intended to broaden, not to narrow, the current authority of State agencies, and does not, in my opinion, preclude payment of employee retirement contributions from personal services line item appropriations, either in circumstances in which there is no separate appropriation for

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the purpose of making employee retirement contributions, or in which the separate appropriation is inadequate. Therefore, for the reasons stated, it is my opinion that employee pension contributions may be picked up either from a separate appropriation for that purpose or from an agency's personal services line item appropriation, or from both.

Respectfully yours,

A handwritten signature in cursive script that reads "Roland W. Burris". The signature is written in black ink and is positioned above the typed name and title.

ROLAND W. BURRIS
ATTORNEY GENERAL