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SPRINGFIELD

July 25, 1977

FILE NO. S-1275

PENSIONS:
Status of Township Cemetery
Board of Trustees as an
Instrumentality for Social
Security Coverage Purposes.

Michael L. Mory, Secretary
State Employees' Retirement
System of Illinois
1201 South Fifth Street
Springfield, Illinois 62708

Dear Mr. Mory:

I have received your letter wherein you ask the following three questions:

Did the change in method of filling the position of township cemetery trustee from election by the town electors to appointment by the township board of trustees, effected by P.A. 78-373, affect the status of the township cemetery board of trustees as an instrumentality for Social Security coverage purposes as defined in section 21-107 of the Social Security enabling Act? Ill. Rev. Stat. 1975, ch. 108 1/2, par. 21-107.

Michael L. Mory - 2.

Does action taken at the township level to participate in the Illinois Municipal Retirement Fund mandate participation in that Fund by instrumentality of the township such as the township cemetery board of trustees?

Does a township cemetery board of trustees lose its status as an instrumentality for Social Security coverage purposes if the township participates in the Illinois Municipal Retirement Fund?

Section 218 of the Social Security Act (42 U.S.C. 418) allows the Secretary of Health, Education and Welfare to enter into an agreement with any State, at that State's request, to extend Federal Old-Age, Survivors, and Disability Insurance benefits to individuals performing services as employees of the State, any of its political subdivisions, or instrumentalities of either the State or its political subdivisions. "Instrumentality" is not defined in the Social Security Act, but section 21-107 of the Social Security Enabling Act (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 21-107) supplies the definition, as follows:

"'Instrumentality': A juristic entity which is legally separate and distinct from the State of Illinois and its political subdivisions and whose employees are not by virtue of their relation to such juristic entity employees of the State of Illinois or such political subdivisions."

In a previous unpublished opinion, issued September 8, 1960, one of my predecessors stated that

Michael L. Mory - 3.

the board of trustees of a township cemetery under section 1 of "AN ACT in relation to the control and maintenance of and the purchase of land and construction of necessary buildings for public graveyards", (Ill. Rev. Stat. 1975, ch. 21, par. 13), was an instrumentality, separate and distinct from the township. This determination was based on the trustees' authority and not on the manner of their selection. The opinion emphasized that the trustees have the authority to levy a tax "to control, maintain, and purchase land and construction of necessary buildings for cemeteries", if the township electors vote for such a levy, under section 1c of the Act. (Ill. Rev. Stat. 1975, ch. 21, par. 14b.) This authority to levy a tax is separate from the authority of the township board of trustees, under section 13, article XII of "AN ACT to revise the law in relation to township organization" (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 126.3), to levy a tax for those same purposes. Based on this independent authority to levy, my predecessor concluded that the township cemetery board of trustees was a juristic entity separate and distinct from the township for purposes of Social Security coverage. Since the authority of the cemetery trustees to levy a tax pursuant to section 1c of "AN ACT in

Michael L. Mory - 4.

relation to the control and maintenance of and the purchase of land and construction of necessary buildings for public graveyards" (Ill. Rev. Stat. 1975, ch. 21, par. 14b), has remained intact, separate from the township board of trustees' power to levy a tax for the same purposes, it follows that the cemetery board's status as an instrumentality has also remained intact, regardless of the change in method of filling trustee positions from election to appointment. Therefore, the answer to your first question is that there has been no change in the status of the cemetery board of trustees as an instrumentality for Social Security coverage purposes.

The answer to your second question is found in section 7-132.1 of the Illinois Pension Code. (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 7-132.1). That section states:

"For purposes of this article, a town which is not a participating municipality on the effective date of this Act, shall be considered to include the town itself and all other bodies politic heretofor or hereafter established by or subject to the direct or indirect control of the town electors. As so defined, a town may participate in the Fund, on the first day of January after the year in which a valid participating ordinance, adopted by the town electors, has been filed with the Board. * * *

* * *

(d) An ordinance to elect participation shall specifically provide that it includes participation by all bodies politic, heretofor, or

hereafter created, included in the town for purposes of this Article. If such ordinance is adopted, the Town Clerk shall forthwith forward a certified copy thereof to the Fund.

* * *

No town may elect to participate in this Fund except as provided in this section. In any town which has not elected to participate in the Fund on the effective date of this Act, no body politic established by or subject to the control of the town electors may elect to participate in the Fund, except as a part of the town as provided in this section." (Emphasis added.)

The language "direct or indirect control" indicates that a body politic under any control of the township electors must be included if the town (or township) is to be allowed to participate in the Illinois Municipal Retirement Fund. Section 1c of "AN ACT in relation to the control and maintenance of and the purchase of land and construction of necessary buildings for public graveyards" (Ill. Rev. Stat. 1975, ch. 21, par. 14b), requires that before the trustees may exercise their authority to levy a tax, the electors must request it by majority vote. Therefore, the trustees are under indirect control of the electors, since only the electors may empower the trustees to use their authority to levy a tax. The electors also have indirect control over the cemetery trustees in that the trustees are appointed by elected officials. It seems clear that the intent of the

Michael L. Mory - 6.

statute is to avoid fragmentation of towns into their several bodies politic for purposes of participation in the Illinois Municipal Retirement Fund. From the foregoing, it is my opinion that the answer to your second question is that if a township elects to participate in the Illinois Municipal Retirement Fund, all of its bodies politic, including the cemetery board of trustees, are required to participate in the Fund.

Your third question assumes that the township has elected to participate in the Illinois Municipal Retirement Fund. As I have said in answer to your second question, such participation must include the cemetery board of trustees.

In 1957, participants in the Illinois Municipal Retirement Fund voted in a referendum to coordinate that Fund with Social Security as a retirement system coverage group, as authorized by section 218(d)(4) of the Social Security Act, 42 U.S.C. 418 (d)(4).

Section 7-136 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 7-136) states:

"Subject to the provisions of the Agreement with the State Agency as provided in Section 7-170, the following described municipalities (including all instrumentalities thereof), and

Michael L. Mory - 7.

participating instrumentalities shall be considered covered under the Federal Social Security Act and shall be subject to this Article pertaining to covered municipalities and participating instrumentalities beginning upon the effective dates hereinafter specified:

(a) All municipalities (and instrumentalities thereof) and participating instrumentalities participating on December 31, 1957 shall be covered as of January 1, 1956;

(b) All municipalities (and instrumentalities thereof) and participating instrumentalities that begin participation after December 31, 1957, shall be considered covered as of the effective date of participation."

The definition of "municipality" under section 7-105 of the Code (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 7-105), includes township. Therefore, a township, including its bodies politic, is covered under the Social Security agreement from the moment it begins participation in the Illinois Municipal Retirement Fund.

Technically, in direct answer to your question, an instrumentality as defined in the Social Security Enabling Act is always an instrumentality for purposes of Social Security coverage in that it is eligible to have a separate coverage agreement, and can be a separate coverage group under section 218(b)(5) of the Social Security Act (42 U.S.C. 418(b)(5)) in the event it is not otherwise covered. However,

Michael L. Mory - 8.

once the instrumentality is included under the Illinois Municipal Retirement Fund, as it must be if the township participates, that instrumentality is covered under Social Security automatically pursuant to section 7-136 of the Illinois Pension Code (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 7-136). At that time it ceases to be eligible for a separate coverage agreement, since it is a part of the Illinois Municipal Retirement Fund retirement system coverage group.

Very truly yours,

A T T O R N E Y G E N E R A L