

This opinion is issued in response to a request from Dale Orr, Administrator, Fiscal Services Division, Public Employees Retirement System (PERS), concerning the status of public employers who participate in PERS.

### QUESTION PRESENTED

Are public employers who participate in PERS "beneficiaries" of the Public Employees Retirement Fund (PERF)?

### SHORT ANSWER

No.

### DISCUSSION

#### I. Background

##### A. Governing Statutes

The PERF is a trust fund. ORS 238.660(1) provides that the PERF "is declared to be a trust fund, separate and distinct from the General Fund, for the uses and purposes set forth in this chapter and ORS 237.950 to 237.980, and for no other use or purpose." The Public Employees Retirement Board (PERB) is the trustee of the PERF. ORS 238.660(1).

ORS 238.660(2) delineates the status of contributing employers with respect to the PERF, as follows:

The State of Oregon and other public employers that make contributions to the fund have no proprietary interest in the fund [PERF] or in the contributions made to the fund by them. The state and other public employers disclaim any right to reclaim those contributions and waive any right of reclamation they may have in the fund.

Assets of the PERF may be used only for the payment of benefits to members and their beneficiaries and for the payment of the system's administrative expenses. *See generally* ORS ch 238.

##### B. Previous Attorney General Opinions

In 38 Op Atty Gen 41 (1976), we discussed the relationship between the statutes authorizing the creation of reserves within the PERF and the statutory requirement that PERS member accounts be credited with a guaranteed rate of return each year. We concluded that earnings on employer reserves and retiree reserves maintained by PERF could not be used to fund the guaranteed return on member accounts. We gave several reasons for this conclusion. Among those reasons was the following:

Finally, in the absence of an express requirement to do so by the trust creator, [the] trustee (PERS) applying the earnings of two groups of trust beneficiaries (employer and retiree) toward a deficit, the creation of which benefitted only a third group of trust beneficiaries (employee), would probably violate the trust concept that no beneficiary of a trust should benefit to the detriment of another beneficiary.

\* \* \* As trustee of the Public Employees' Retirement Fund, the Public Employees' Retirement Board is a fiduciary for each beneficiary thereof. Thus, the board may not apply employer and retiree earnings toward the deficit [created by funding the guaranteed return on member accounts] \* \* \*.

*Id.* at 44 (footnote omitted). This conclusion was based on the assumption that public employers who participate in PERS are beneficiaries of the PERF trust. The 1976 opinion contains no express analysis of that issue.

In 38 Op Atty Gen 880, 885 (1977), we reiterated the 1976 opinion's conclusion that employers are beneficiaries of the PERF, stating:

The [PERS] board's position is that the "percentage amounts" adopted by it as an "assumed interest rate" for crediting earnings to reserves must be the same for all accounts. This board interpretation in part is consistent with 37 Op Atty Gen 41, (1976), where we held the trust concept of the Retirement Fund to require that no beneficiary of a trust (employer, employee or retiree) should benefit to the detriment of

another beneficiary. In other words, by crediting interest equally to all accounts, all beneficiaries of the fund are treated equally.

We are now asked whether our earlier opinions were correct in stating that participating employers are PERF "beneficiaries" in light of the Oregon Supreme Court's recent holding in *Stovall v. State of Oregon*, 324 Or 92, 922 P2d 646 (1996).

### C. The Stovall Opinion

In *Stovall*, the local government defendants argued, among other things, that the repeal of the state income tax exemption for PERS benefits and the enactment of Oregon Laws 1995, chapter 569 (House Bill 3349) impaired or breached a statutory contract between the state and participating local government employers. 324 Or at 111. The local governments also argued that the state was responsible for compensating all PERS members, including those employed by local governments, for the loss of the state income tax exemption. *Id.* at 121. The Supreme Court rejected both arguments, holding that as a matter of law local governments cannot enforce statutory contracts with the state and that the local governments who participate in PERS are directly responsible to their employees for providing and funding PERS retirement benefits. *Id.* at 128.

The *Stovall* opinion discusses at length the status of participating public employers with respect to the PERF. The court characterized the relationship between participating employers and PERS as follows: "[P]articipating PERS employers provide and fund the benefits; PERF and PERB act as a conduit through which those benefits pass." *Id.* at 124. The court emphasized that participating employers have no proprietary interest in any assets of the PERF or in any contributions made to the PERF, stating:

Employer contributions are placed in PERF, which is a "trust fund, separate and distinct from the General Fund," established for the purpose of providing benefits to PERS members. ORS 238.660(1). Participating PERS employers "have no proprietary interest in the fund or in the contributions made to the fund." ORS 238.660(2). *In other words, participating employers contribute to the fund not for their own sake, but for the sake of their employees.*

*Id.* at 121 (emphasis added).

## II. Employers' Relationship to the PERF

With the exception of cases interpreting the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 USC §§ 1002-1461 (1985), there is very little case law applying trust principles to employee benefit trusts. The ERISA cases are not directly applicable because ERISA does not apply to governmental plans such as PERS. 29 USC § 1003(b). Therefore, we rely primarily on generally recognized authorities on trust law for guidance in this area. *See* 46 Op Atty Gen 506, 508 n 2 (1993). Because ERISA's fiduciary provisions are based on common law trust principles, however, we also review cases interpreting those provisions to aid our analysis. *See Central States, Etc. v. Central Transport, Inc.*, 522 F Supp 658, 665 (ED Mich 1981) (legislative history of ERISA indicates drafters intended fiduciaries to be governed by common law trust principles); 46 Op Atty Gen at 508 n 2 (ERISA cases, while not directly applicable, "may be persuasive authority on some fiduciary issues"). Finally, we also consider the implications of the employers' status on the PERF's being maintained as a qualified trust under the Internal Revenue Code.

### A. Trust Authorities

Generally recognized trust authorities define the "beneficiary" of a trust as the person or entity for whose benefit the trust property is held. *See, e.g.*, Bogert, *The Law of Trusts & Trustees* § 1 (rev 2d ed 1984) ("The person for whose benefit property is held in trust is the beneficiary."); Restatement (Second) of Trusts § 3(4) ("The *beneficiary* or *cestui que trust* is the person for whose benefit the trust property is held by the trustee").

ORS 238.660(2) provides that participating PERS employers "have no proprietary interest" in the PERF or in their own contributions to the PERF and that they have no right to reclaim any assets of the PERF. The *Stovall* court emphasized that participating employers "contribute to the fund *not for their own sake*, but for the sake of their employees." *Id.* at 121 (emphasis added). It is clear from these authorities that participating PERS employers are not among the persons or entities for whose benefit the PERF assets are held in trust. Therefore, the employers are not trust "beneficiaries" as that term is defined by generally recognized trust authorities.

### B. ERISA Cases

Courts that have considered similar issues under ERISA have declined to treat contributing employers as beneficiaries of employee benefit trusts to which they contribute. *See, e.g., NLRB v. Amax Coal Co.*, 453 US 322, 334, 101 S Ct 2789, 69 L Ed2d 672 (1981) (language and legislative history of Taft-Hartley Act and ERISA "demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party [e.g., employer or union] that appointed him"); *Board of Trustees v. California Co-op. Creamery*, 877 F2d 1415, 1422 (9th Cir 1989) (under ERISA, board of trustees' fiduciary duties are owed only to participants and beneficiaries of multi-employer health and welfare trust; board owed no fiduciary duty to participating employer); *United Foods v. Western Conference*, 816 F Supp 602, 614 (ND Cal 1993) (trustees of multi-employer pension fund owed fiduciary duties solely to plan participants and not to contributing employers). Thus, the ERISA cases provide additional support for the conclusion that participating employers are not beneficiaries of the PERF trust.<sup>(1)</sup>

### C. Federal Tax Qualification

The PERF is intended to be a qualified trust under § 401(a) of the federal Internal Revenue Code, 26 USC § 401(a). *See, e.g.,* ORS 238.630(3)(h) (authorizing PERB to "adopt rules and take all actions necessary to maintain qualification of [PERS] and the [PERF] as a qualified governmental retirement plan and trust under the Internal Revenue Code"). One condition of such qualification is that the trust's terms must make it impossible for any of the corpus or income to be "used for, or diverted to, purposes other than for the exclusive benefit of his [the employer's] employees or their beneficiaries." 26 USC § 401(a)(2).

Treasury Regulation 26 CFR § 1.401-2(a)(3) provides:

As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

We believe that characterizing employers as PERF "beneficiaries" would be inconsistent with the evident legislative policy that the PERF be maintained as a qualified trust under 26 USC § 401(a). A trust will not satisfy the qualification requirements unless the trust's assets may be used only for the exclusive benefit of covered employees and their beneficiaries. 26 USC § 401(a)(2); 26 CFR § 1.401-2(a)(3). For purposes of this requirement, the phrase "their beneficiaries" obviously refers to beneficiaries of the covered employees. Under federal law, therefore, the only persons who can have a beneficial interest in the assets of a qualified trust are the covered employees and the beneficiaries of those employees. Inclusion of a participating employer as a trust beneficiary clearly would jeopardize the trust's qualified status under 26 USC § 401(a).

### III. Conclusion

For the reasons discussed above, we conclude that participating PERS employers are not beneficiaries of the PERF trust. To the extent that they are inconsistent with this opinion, we hereby reverse those portions of our earlier opinions.<sup>(2)</sup>

HARDY MYERS  
Attorney General

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1. The common law principle that a trustee owes a fiduciary duty only to the trust's beneficiaries is discussed at length in *NLRB v. Amax Coal Co.*, 453 US 322, 101 S Ct 2789, 69 L Ed2d 672 (1981). In that case, the United States Supreme Court explained that charging an employee benefit plan trustee with fiduciary duties toward contributing employers as well as toward plan participants and beneficiaries would create an inherent conflict of interest that would be inconsistent with the trust relationship. *Id.* at 328-34.

Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. \* \* \* To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

*Id.* at 329-330 (citations omitted). *See also* Bogert, *The Law of Trusts & Trustees*

§ 95 (trustee's duty of loyalty to trust beneficiaries is to administer trust solely in beneficiaries' interest without considering interests of trustee or other third persons).

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2. This opinion does not address whether PERB may have statutory or other legal duties toward participating PERS employers.

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