Laborers' and Retirement Board Employees'
Annuity and Benefit Fund of Chicago

Special Meeting – Regular Minutes

September 12, 2019
9:06 AM
Office of the Fund

Date of Meeting:	September 12, 2019	
Start Time:	9:06 a.m.	
Location:	The Fund Office, 321 N. Clark Street, Suite 1300, Chicago, IL 60654	

The following were Present:

	Victor Roa	– President
	James Joiner	– Vice President
	Michael LoVerde	– Secretary
	Carol Hamburger*	– Trustee
	James Capasso, Jr.	– Trustee
	Melissa Conyears-Ervin*	– Trustee (arrive 9:17 a.m.)
	Reshma Soni*	– Trustee (arrive 9:10 a.m.)
Staff & Consultants:		
	Joseph Burns	– Jacobs, Burns, Orlove & Hernandez, Outside Counsel
	Taylor Muzzy	– Jacobs, Burns, Orlove & Hernandez, Outside Counsel
	James Wesner*	– Marquette Associates, Investment Consultant
	Kweku Obed*	– Marquette Associates, Investment Consultant
	Neil Capps*	– Marquette Associates, Investment Consultant
	John Carroll	– Compliance Administrator
	Nadia Oumata	– Manager of Accounting and Investments
Absent:	Jennie Bennett	– Trustee
Observer:	Craig Flack*	– Office of the City Treasurer, City of Chicago
	Martin Johnson	– Office of the Chief Financial Officer, City of Chicago

** Denotes partial attendance.*

A special meeting of the Retirement Board ("Board") of the Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago was held at the Fund office on September 12, 2019. President Roa declared there was a quorum after Secretary LoVerde took attendance. There was no public participation.

MANAGER PRESENTATIONS

Mr. Wesner noted that there were going to be three manager presentations given on this day and he noted that two of the managers have successor funds that he thought the Board should consider for further investments. Mr. Wesner noted that the LABF sometimes looks first to its current managers and their successor funds when considering additional private market investments.

Neuberger Berman Presentation

Anthony Woodside, Ashok Bhatia and Marc Dietrich of Neuberger Berman Investments [NB] provided an update regarding the firm's fixed income platform, its investment strategy and performance, and recent investment guideline changes. The team from NB also discussed the current economic environment and highlighted some of the opportunities that they see in the current market. The Board asked the NB team to provide further information regarding the firm's employee diversity as well as its philanthropic initiatives in Chicago.

Brightwood Capital Advisors Presentation

Sengal Selassie of Brightwood Capital Advisors [Brightwood] provided an overview of the firm's private loan platform, reviewed the performance of the firm's previous investment funds, and gave an overview of the firm's investment process. Mr. Selassie also introduced two new funds for which the firm is currently raising capital – Brightwood Capital SBIC III, LP and Brightwood Capital Fund V LP.

Long Wharf Capital Advisors Presentation
Michael Elizondo and Sarah Biggs of Long Wharf Capital gave an overview of their firm, described their firm's investment approach and strategy, gave their market observations, and reviewed Long Wharf's employee diversity charts with the Trustees. The team from Long Wharf also introduced the Long Wharf Real Estate partners VI, L.P. which is open to new investors. The Trustees asked questions of the Long Wharf team regarding the company diversity responses they provided as part of their RFP response.

The Board deferred discussion regarding the investment manager presentations until the Tuesday, September 17, 2019 meeting.

James Wesner, Kweku Obed, and Neil Capps and Trustee Conyears-Ervin left the meeting.

TRUSTEE FIDUCIARY STANDARDS TRAINING

Mr. Burns and Mr. Muzzy conducted a training session on trustee fiduciary responsibilities, and they reviewed several notable court decisions regarding fiduciary matters. See attached document. Mr. Muzzy led the Board through a series of questions to reinforce some of the pertinent points from the training session.

Trustee Hamburger and Trustee Soni left the meeting during the above training session.

POSTPONED AGENDA ITEMS

The Trustees postponed the discussions on the contract matter, the legislation update, miscellaneous items, and the employer contribution mechanics matter until a future meeting.

ADJOURNMENT

With no further business, at 12:22 a.m., Trustee Capasso made a motion to adjourn. Trustee LoVerde seconded the motion.

Roll-call: For -- Trustees Roa, Joiner, LoVerde and Capasso.
Against -- None.

LABORERS' & RETIREMENT BOARD EMPLOYEES' ANNUITY AND BENEFIT FUND OF CHICAGO

September 12, 2019

TRUSTEES' TRAINING PRESENTATION

By: Joseph M. Burns and Taylor E. Muzzy

Jacobs, Burns, Orlove & Hernandez
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ROLE AND RESPONSIBILITIES OF FIDUCIARIES

The Fund

- Definition of the Fund: The Laborers' & Retirement Employees' Annuity and Benefit Fund of Chicago (the "Fund") is a "body politic and corporate." The Trustees of the Fund are hereby declared to be the officials of such body politic and corporate, vested with the powers and duties set out in said law. 40 ILCS 5/11-101, 103.

- Purpose of the Fund: The Fund is created in the "public interest" and for the "general welfare" of the State. It has its own purpose separate and apart from any other governmental body, as set forth in the terms and provisions of the law creating such Fund. 40 ILCS 5/11-101, 103, 104.

Fiduciary Duties

- A Fiduciary is any person who:

    - exercises any discretionary control with regards to the management of the Fund, or exercises any authority or control respecting the management or disposition of its assets; or

    - provides investment advice or provides advice on the selection of fiduciaries, i.e. Investment Consultant, for compensation, direct or indirect, regarding monies or property of the Fund, or has any authority or responsibility to do so; or

    - has any discretionary authority or discretionary responsibility in the administration of the retirement system. 40 ILCS 5/1-101.2.

- The definition of fiduciary is to be broadly construed. It encompasses not only persons holding certain positions with respect to the Fund (such as the named Trustees), but also any person or entity that in fact performs any of the functions described in the statutory definition, regardless of the existence of any formal relationship with the Fund.

    - Persons who perform purely ministerial duties are not fiduciaries.

- A fiduciary must discharge his/her duties solely in the interest of the participants and beneficiaries. 40 ILCS 5/1-109.

    - Courts have interpreted this to mean that fiduciaries must act "with an eye single to the interests of the participants and beneficiaries" and with complete and undivided loyalty to the beneficiaries.

- Trustees "must overcome any loyalty to the interest of the party that appointed" them when functioning in their capacity as plan fiduciaries.

- A fiduciary must discharge his/her duties for the <u>exclusive</u> purpose of:

    - providing benefits to participants and their beneficiaries; and

  - defraying reasonable expenses of administering the Fund. 40 ILCS 5/1-109.

- The Prudence Rule: A fiduciary must discharge his/her duties with the <u>care</u>, <u>prudence</u>, and <u>diligence</u> under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use in a similar situation. 40 ILCS 5/1-109(b).

  - Test: The test for evaluating a fiduciary's prudence in investing plan assets "is one of conduct, and not a test of the result of performance of the investment."

    - Explanation: Because the prudence rule requires the fiduciary to act with the care, skill and prudence of one "familiar with such matters," a Trustee who lacks the education, experience and skill required to make a decision, e.g., regarding the investment of a plan's assets, has an affirmative duty to seek expert advice in making a decision. The failure to do so is imprudent and constitutes a violation of the standard.

  - Examples:

    - No violation of the standard where Trustees, in developing a loan program, consulted attorneys, accountants, actuaries, and four mortgage bankers over a six month period, even though the interest charged on loans made under the program was 2-1/8 percentage points below the prevailing market rates.

    - Trustees were held to have breached the prudence rule when they failed to seek outside advice concerning the soundness of a loan and relied exclusively on the borrower's representations.

  - Fiduciary action may be imprudent even if it does <u>not</u> lead to loss.

    - Example: The fiduciaries' acceptance of a $10 million service provider contract after less than 10 minutes of discussion without any further inquiry was imprudent. The court did not award money damages because the plan had suffered no loss as a result of the imprudence, but the court reviewed its power to remove the Trustees from their positions. The court ultimately decided not to remove them.

  - Good faith

    - Fiduciaries are required to exercise good faith in dealing with plan assets and in administering the provision of the plan. However, good faith alone will not excuse a lack of prudence.

- Fiduciaries must abide by and follow the Fund's By-Laws, Ethics Policy, and State laws such as the Illinois Governmental Ethics Act, 5 ILCS 420/1-101, *et seq.*, and the State Officials and Employees Ethics Act, 5 ILCS 430/1-1, *et seq.*

- A fiduciary must <u>diversify</u> the investments of the Fund so as to minimize the risks of large losses, unless under the circumstances it is <u>clearly prudent</u> not to do so. 40 ILCS 5/1-109(c).

- There is an obligation to monitor Investment Managers and Consultants.

- Extent of Co-Fiduciary Duties: A fiduciary shall not be responsible or liable for the acts of another fiduciary to whom a specific duty was allocated, unless the fiduciary becomes aware of the co-fiduciary's improper actions, except that:

    - each Trustee must use reasonable care to prevent another Trustee from committing a breach of duty; and

    - all Trustees shall jointly manage and control the assets of the Fund. 40 ILCS 5/1-109.2.

Prohibited and Permissible Transactions:

- <u>Prohibited Transactions</u>:

    - A fiduciary may not:

        - deal with the assets of the Fund in one's own interest or for one's account;

        - act in any transaction in a fiduciary or personal capacity on behalf of a party who represents or has interests adverse to the Fund;

        - receive any compensation or anything of value for one's own personal account from any party dealing with or who is involved with the assets of the Fund. 40 ILCS 5/1-110(b).

    - A Trustee, Fund employee, or consultant may not knowingly cause or advise the Fund to engage in an investment transaction with an investment manager when the Trustee, Fund employee, consultant, or their spouse has:

        - Any direct interest in the income, gains, or profits of the investment manager through which the investment transaction is made; or

        - A relationship with that investment manager that would result in a pecuniary benefit to the Trustee, Fund employee, or consultant as a result of the investment transaction. 40 ILCS 5/1-110(e). (Violation of 40 ILCS 5/1-110(e) is a Class 4 felony.)

- <u>Permissible Transactions</u>. A fiduciary is not prohibited from the following:

    - Receiving benefits which one would normally be entitled to as a participant or beneficiary of the Fund.

    - Reimbursement of expenses "properly and actually" incurred while performing duties related to the Fund.

    - Serving as a Trustee in addition to being an officer, employee, agent or other representative of a party in interest. 40 ILCS 5/1-110(c).

- Prohibition on Gifts – The Pension Code makes applicable to Trustees and Fund employees, and their spouses and immediate family members, the Gift Ban Act portion of the State of Illinois Officials and Employees Ethics Act.
    - Prohibited Sources. A Trustee or Fund employee shall not solicit or accept any Gift from the following sources (Ethics Policy, Article 2, Section 2.3(a); State Officials and Employees Ethics Act, 5 ILCS 430/1-5, 10-10):
        - any person seeking official action by a Trustee or employee;
        - any person doing business with or seeking to do business with a Trustee or employee;
        - any person who conducts activities regulated by the Trustee or employee;
        - any person that has interests that may be substantially affected by the performance or nonperformance of the Trustee or employee's official duties;
        - any person registered as a lobbyist;
        - or any agent of, spouse of, or an immediate family member living with one of the persons listed above.
    - Gift. Gift means any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value including, but not limited to, cash, food, drink, travel, lodging, and honoraria for speaking engagements related to or attributable to the official position of a Trustee or Employee. (Ethics Policy, Article 1)
    - Educational Missions and Travel Expenses. The prohibition on Gifts includes educational missions and travel expenses.
        - The Ethics Policy, Article 2, Section 2.12: prohibits Trustees and Fund employees from being reimbursed by a Prohibited Source for travel to an educational conference or seminar and from participating as a speaker or panel participant in such conference or seminar if such conference or seminar is being funded, in whole or in part, by a Prohibited Source.
        - Section 1-150 of the Pension Code and Article 5, Section 5.07 of the By-laws provide that travel and related expenses for attending authorized education conferences or seminars must be approved by a majority of the Board prior to the travel or attendance of the education conference or seminar. Article 5, Section 5.07 of the By-laws provides that only educational conferences and seminars relating primarily to the Fund's business or administration shall be reimbursable. If the reimbursement relates to an educational conference or seminar, the Trustee or Fund employee must provide a copy of the sponsor's certificate of attendance, if a certificate is available, or must certify that she or he attended at least 75% of the workshops or sessions available, unless good cause is shown for the Trustee's or Fund employee's absence.

- Permissible Gifts (Ethics Policy, Article 2, Section 2.3(a)):
    - Food and/or refreshments not exceeding $75 per person in value on a single calendar day, provided that the food and/or refreshments are consumed on the premises from which they were purchased or prepared or catered.
    - Any item(s) from a single Prohibited Source not exceeding $100 annually.
    - Educational materials, but not educational missions or travel expenses.
    - A gift from a relative or on the basis of a personal friendship, as determined under the Gift Ban Act.
    - Bequests, inheritances, and other transfers at death.
    - Gifts to or from other Trustees or Fund employees or the trustees or employees of other public funds.
    - Any opportunities, benefits or services that are available on the same conditions as for the general public.
    - Anything for which the Trustee or employee pays the market value.
    - Benefits resulting from outside business or employment activities (not connected to official Fund duties), if such benefits have not been offered or enhanced due to the Trustee or employee's official position.
    - A contribution lawfully made under the Election Code.
- Disposition of Gifts. A Trustee or Fund employee does not violate the Gift Ban if he or she promptly takes reasonable action to return a Gift from a Prohibited Source to its source or gives the Gift or an amount equal to its value to an appropriate charity that is exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986. (Ethics Policy, Article 2, Section 2.3(b))

Fraud Reporting. A Trustee (and the Fund's Executive Director) with a "reasonable suspicion" of a false statement or falsified record being submitted, or being permitted to be submitted, to the Fund must immediately refer such fraudulent activity to the Board of Trustees or the State's Attorney. The Board must immediately notify the States' Attorney of the fraudulent activity. A "reasonable suspicion" means "a belief, based upon specific and articulable facts, taken together with rational inferences from those facts, that would lead a reasonable person to believe that a fraud has been, or will be, committed." (5 ILCS 5/1-135)

Liability and Indemnification of Trustees and Fund Employees.

- Any fiduciary who breaches his or her fiduciary duty, including but not limited to failing to report a reasonable suspicion of a false statement being submitted (or being permitted to be submitted) to the Fund, is personally liable for any losses to the Fund resulting from such breach, for any profits made by using Fund assets, and subject to equitable or remedial relief as deemed appropriate by a court, including removal of the fiduciary. (5 ILCS 5/1-114)

- In accordance with 40 ILCS 5/1-107, the Fund shall indemnify all Trustees and Fund employees against all damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of their duties as Trustees or in the scope of their employment or under the direction of the Board. However, Trustees and Fund employees shall not be indemnified for willful misconduct or gross negligence. (Bylaws, Article 7)

Use or Disclosure of Confidential Information. The Ethics Policy, Article 2, Section 2.5, prohibits current or former Trustees or Employees from using or disclosing, other than in the performance of his or her Fund related duties and responsibilities, or as may be required by law, confidential information gained in the course of or by reason of his position or employment. "Confidential Information" means any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended.

Statement of Economic Interest. Pursuant to the Illinois Governmental Ethics Act, 5 ILCS 420/4A-101, *et seq.*, each Trustee is required to file a statement of economic interest with the Clerk of Cook County by May 1 of each year, which shall include the following:

- Any professional organization or individual professional practice in which the Trustee was an officer, director, associate, partner, or proprietor, or served in any advisory capacity, from which income in excess of $1,200 was derived during the preceding calendar year;

- If the Trustee receives fees exceeding $5,000 for professional services during the preceding calendar year from any entity, the Trustee shall identify the nature of the professional services and the nature of the entity to which the services were rendered;

- The identity of any capital asset from which a capital gain of $5,000 or more was realized in the preceding calendar year;

- The name of any unit of government which has employed the Trustee making the statement during the preceding calendar year, other than the Fund.

- The name of any entity from which a gift(s), or honorarium or honoraria, valued singly or in the aggregate in excess of $500, was received during the preceding calendar year.

- The name and instrument of ownership in any entity doing business with the Fund in which the Trustee held any ownership interest, if the ownership interest is greater than $5,000 or if dividends in excess of $1,200 were received from the entity during the preceding calendar year;

- Except for professional service entities, the name of any entity and any position held therein from which income in excess of $1,200 was derived during the preceding calendar year, but only if the entity does business with the Fund.

Ethics Training. The Pension Code requires each Trustee to complete, at least annually, 8 hours of ethics training which shall include training on ethics, fiduciary duty, investment issues, and any other curriculum established by the Fund. The Fund must certify annually in writing that the Trustee has completed such training. (40 ILCS 5/1-113.18)

Open Meetings Act and Parliamentary Procedure Items

- Open Meetings Act Electronic Training. Each Trustee must successfully complete the electronic training curriculum developed and administered by the Public Access Counselor within 90 days of becoming a Trustee. Each Trustee must file a copy of the certificate of completion with the public body. Failure to comply with the training requirement does not affect the validity of any action taken by the public body. (5 ILCS 120/1.05)

- Meeting. A "meeting" includes "any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business …." (5 ILCS 120/1.02)

- Agenda. The agenda for each regular and special Board meeting shall be posted on the Fund's website, at the Board Office, and at the location of such meeting at least 48 hours in advance of the meeting, unless an exception applies under the Open Meetings Act. The agenda for each Board meeting shall set forth the general subject matter of any resolution that will be the subject of final action at the meeting. While the Board may consider items that are not specifically set forth in the agenda for a regular meeting, the Board cannot take action or make any decision with respect to such items. The Board shall not consider items that are not specifically set forth in the agenda for a special meeting. (By-Laws Article 4, Section 4.06; 5 ILCS 120/2.02)

- Quorum. A quorum must be physically present at the location where the meeting is being held. This applies to both open and closed meetings. In accordance with the Open Meetings Act, Article 4, Section 4.12 of the Board's By-Laws provide that a Trustee may, upon majority vote of Trustees present, participate remotely if the Trustee is prevented from physically attending due to: (1) personal illness or disability; (2) employment purposes or Fund business; or (3) a family or other emergency. A Trustee who is allowed to participate by telephone, video or internet conferencing shall not be considered present for purposes of a quorum, but shall be considered in attendance for all other purposes and allowed to vote on matters brought before the Board. (By-Laws Article 4, Sections 4.04, 4.12; 5 ILCS 120/2.01)

- Closed Session. The Board may hold a closed meeting or close a portion of a meeting, upon a majority vote of a quorum present, as authorized by the Act's exceptions (e.g. when litigation is pending, or is probable or imminent, meetings with auditors). The Board must keep written minutes and a verbatim record (e.g. a court reporter or an audio recording) of all closed meetings. No final action may be taken at a closed meeting. Final action must be taken at an open meeting and "must be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." (5 ILCS 120/2(c), (e), 2.06, 2a)

- Parliamentary Authority. The current edition of Robert's Rule of Order Newly Revised shall govern in questions of procedure in any cases not covered by the By-Laws. (By-Laws Article 10)

- Public Right to Speak. Citizens have a right to address the Board at any Board meetings, subject to rules established and recorded by the Board. (5 ILCS 120/2.06(g))

- Violations of Open Meetings Act. Violations of the Open Meetings Act, except violations of the electronic training requirements, are a Class C misdemeanor. (5 ILCS 120/4)

Private Securities Litigation Reform Act of 1995 (PSLRA)

- The PSLRA was enacted to target perceived abuse by plaintiffs' lawyers in class action securities litigation by, among other things, inserting institutional investors as lead plaintiffs. The PSLRA requires the court to appoint a lead plaintiff in every securities class action.

- The PSLRA provides that the court should appoint as lead plaintiff the applicant that has the "largest financial interest" in the relief sought by the class and is otherwise adequate and typical of the other class members.

- The lead plaintiff is responsible for selecting counsel and negotiating attorney fees, approving proposed settlements, and otherwise directing the course of the litigation.

- Class actions with institutional investors as lead plaintiffs typically achieve higher settlements with lower attorney fees. In addition, the institution can balance the interests of the class with the long-term interests of the company, and can make significant changes in corporate governance.

- Cases are generally prosecuted on a fully contingent basis, with counsel advancing all costs, rather than an hourly basis, often resulting in lower attorney fees.

NOTABLE CASES

People of the State of California v. Villalobos, et al.

The State of California sued former-trustee Alfred Villalobos and former-CEO Fred Buenrostro of the California Public Employees Retirement System ("CalPERS") for fraud. Villalobos owned a placement company, ARVCO Capital, which spent lavishly on Buenrostro by taking him on an around-the-world trip, paying for his wedding, and giving him a condo and a $300,000 job at ARVCO when he left CalPERS. Buenrostro influenced the CalPERS Board of Trustees to authorize investments that generated over $40 million in commissions to Villalobos.

The Court froze Villalobos' assets, including two Bentleys, two BMWs, a Hummer H2, $2.7 million in artwork, and 14 properties in California, Nevada and Hawaii. The U.S. Justice Department and the SEC also filed lawsuits. Buenrostro pleaded guilty to conspiracy to commit fraud and is scheduled to be sentenced in December 2015. In January 2015, five weeks before he was due to stand trial, Villalobos committed suicide. In 2016, the state settled with his estate for $20 million, although his estate ultimately did not have the money to pay the settlement.

<u>Milliman, Inc. v. Maryland State Retirement and Pension System, et al.</u>
25 A.3d 988 (Md. 2011)

In 1982, the Maryland State Retirement and Pension System ("Fund"), which is composed of ten independent pension funds, hired Milliman as its actuary. In 2004, Milliman discovered a longstanding coding error, affecting three of the pension funds, which failed to account for the benefits payable to the surviving spouses of judges and police officers. The coding error resulted in $34 million in lost contributions and $38 million in lost interest on those contributions.

The Fund sued Milliman for breaching its actuarial standard of care by failing to exercise reasonable care and diligence in interpreting data from the Fund. Milliman argued that: (1) the Fund was not harmed because the taxpayers would fund any deficiency; (2) the Fund was not harmed because it would ultimately become fully funded; (3) the Fund was contributorily negligent by failing to clarify and explain the data it provided to Milliman; and (4) damages to the Fund should be offset by money that remained in the State's general fund and was never contributed to the Fund due to Milliman's error. The Court rejected Milliman's arguments and held that Milliman breached its standard of care.

<u>Lexin v. Superior Court</u>
222 P.3d 214 (2010)

The San Diego City Employees' Retirement System ("SDCERS") is a defined benefit plan funded by contributions from the City of San Diego ("City"), and its employees, and is overseen by a 13-member Board of Trustees ("Board") (3 trustees were ex officio (city manager, treasurer, and auditor), 1 trustee was elected by fire safety members, 1 trustee was elected by policy safety members, 1 trustee was elected by retired members, 3 trustees were elected by the active members, and 4 trustees were appointed by the city council).

Until 1996, the City made contributions to SDCERS according to an actuarial determination of the contribution rate. In 1996, SDCERS was 92.3% funded and the City proposed, and the Board approved, that contributions would be made at a set rate less than the actuarial rate, to be increased each year until the annual rate equaled the actuarial rate. There was a "safety valve" provision that required the City to make a lump sum contribution if SDCERS' funded ratio dropped below 82.3%.

In 2001, after the dot-com crash, SDCERS' earnings began falling and in the year 2002 its funded ratio dropped from 97% to 90%. The City was concerned that the safety valve would be triggered and it would have to make a lump sum contribution of $25 million in one year. During that same year, the City started negotiations with its municipal unions over new labor agreements. <u>The unions sought an increase in pension benefits to which the City agreed, on the condition that the Board would drop the triggering "safety valve" percentage from 82.3% to 75% and, rather than requiring a lump sum contribution if the "safety valve" was triggered, the City would have 5 years to increase its contributions.</u>

The City presented this proposal to the Board, informing the Board that the proposal was a contingency of a tentative agreement with 3 of the 4 municipal unions. The Board rejected that proposal but passed an alternative proposal, whereby the 82.3% trigger remained in place but the City had 7 years to increase its contributions, rather than making a lump sum contribution.

Six of the trustees (3 ex officio trustees, 2 trustees elected by active membership, and 1 trustee elected by fire safety members), all of whom were City employees and voted in favor of the alternative proposal, were charged with felony violations of California's statute that prohibited conflicts of interest. Specifically, a magistrate judge and trial court found probable cause that the trustees violated the conflict of interest statute by approving an increase in pension benefits, in which they had a financial interest, that was contingent on a reduction in the City's contribution requirements. The appellate court agreed. The California Supreme Court agreed that there was a conflict of interest, but held that 5 out of the 6 trustees were exempt under a statutory exception for public services. Those 5 trustees' conflicts of interest were exempt because the increased pension benefits were provided to those trustees on the same terms and conditions as they were to all other City employees.

Donovan v. Tricario

5 EBC (BNA) 2057 (S.D. Fla. 1984)

Defendants Tricario and the Giardiello brothers were trustees of a health and welfare fund which provided group term insurance to its participants for many years. Prior to 1974, the trustees used competitive bidding and solicited written bids before retaining an insurance carrier. In 1976, the trustees decided to convert the group policies to a form of whole-life, without any due diligence, from the same insurance company. Premiums were higher under the whole life policy. At the same time, one of the principals of the insurance company purchased a 36 foot boat and made it available to a trustee for his personal use. The insurance company retained title to the boat and paid all of the related expenses. Two trustees received $5,000 per month from the insurance company for agreeing to assist the company in obtaining business throughout the region.

The Secretary of Labor alleged that the policies were too expensive, were obtained without due diligence and that the trustees were liable for disgorgement of all benefits received from the insurance company. The Court sustained all of the Secretary's allegations. Acting without competitive bids, without due diligence, and without "expert advice" was a breach of fiduciary duties. The Court concluded:

> ERISA does not require that all plan fiduciaries … be experts in all phases of plan administration. Nor does it require them to have expert knowledge in the whole range of activities carried on by a plan. Rather, they are encouraged to retain expert advisors to assist in making decisions that require special skills not normally possessed by laypersons.
>
> The mere retention of an expert cannot be permitted to act as a kind of talisman to protect the defendants against claims of failure to discharge their own fiduciary responsibilities. Expert advice must be considered as carefully as any other information that the trustees have available to them when making decisions to commit plan assets. Under the circumstances of the instant case, the failure of Mastrangelo to provide any advice to the trustees on the issue of whole life insurance cannot excuse the defendants' failure to require expert advice before committing the plans' assets to Farmers.

The Court specifically found that the monthly payments "were consideration received for these defendants' own personal account from a party dealing with the... Plan in connection with a transaction involving assets of the Plan and are flatly prohibited by ERISA." The Court ordered restitution and permanently enjoined defendants from serving as trustees.

<u>N.Y.S. Teamsters Council v. Estate of DePerno</u>
816 F.Supp. 138 (N.D.N.Y. 1993)

Trustee DePerno was a trustee of a Health & Welfare Fund and other benefit funds. His son, attorney DePerno, was counsel to the Fund. Attorney DePerno also owned a seasonal restaurant, which his wife helped to operate. For five years, from 1981 through 1986, two of the cooks who were employed at the restaurant during the summer were -- at the direction of Trustee DePerno -- employed in the winter as maintenance men at the Fund's building.

Plaintiffs alleged that the hiring of the cooks during the winter was imprudent and unreasonable. The Trustee and attorney claimed that additional maintenance men were needed in the winter, and that the 2 seasonal employees were paid at a reasonable rate. The evidence also showed that after the cooks were no longer working at the Fund the jobs were subcontracted out and that the subcontracting was more expensive.

The Court concluded that:

1. Attorney DePerno and his wife were parties in interest. The cooks were also "parties in interest" because they were employees of attorney DePerno.

2. Trustee DePerno breached his fiduciary duty by having a party in interest – the cooks – provide services to the Fund. Although the Defendants argued that the Fund paid the cooks reasonable wages, the Court found that it was nevertheless a violation of fiduciary duties because the Trustee violated the duty of trust imposed upon fiduciaries.

3. Trustee DePerno also breached his fiduciary duty because he furnished a service to the parties in interest -- the cooks -- by transferring assets of the Fund for the benefit of the cooks. By paying the cooks their <u>wages</u>, the Fund conferred a benefit on the cooks with Fund assets.

4. The Trustee did not discharge his duties solely in the interest of the participants and beneficiaries because the basis for hiring the cooks was solely because they worked for his son.

5. As a party in interest, Attorney DePerno knowingly participated in Trustee's DePerno fiduciary breaches and was also liable. A party in interest, even though not a fiduciary, may still be liable to the same extent as the fiduciary if the party in interest knowingly participates in the fiduciary breach.

6. Attorney DePerno's wife was a party in interest because she was the daughter-in-law of Trustee DePerno.

7. Although the Court found numerous instances of breaches of fiduciary duty, it found

that the hiring of the cooks did not create any tangible loss to the Fund, and that the Fund was not worse off financially as a result of Trustee DePerno's breach in hiring the cooks. The Court awarded $1.00 in damages.

Brink v. DaLesio

496 F. Supp. 1350 (D. Md. 1980)

Affirmed in part, reversed in part, Brink v. DaLesio, 109 LRRM 3310 (4th Cir. 1982)

John was a trustee of a pension fund. Alfred performed consulting, administrative and insurance brokerage services for several union pension and welfare funds.

John chose Alfred as the administrator and insurance consultant for the pension fund. After this event, Alfred bought a condominium. John lived in the condominium for three summers in a row, and Alfred paid the rent and all other costs, including taxes, repair bills, condominium fees, insurance, cable charges and utility fees.

The Court ruled that John breached his fiduciary duty by accepting the benefits offered by Alfred in the form of rent-free use of the condominium.

It makes no difference whether the Funds absorbed any of the costs incurred or whether there was any demonstrable effect on the trustee's conduct as a fiduciary (i.e. his selection of Alfred as the administrator and insurance consultant). The important factor here was that John accepted the benefits offered by Alfred in the form of rent-free use of the condominium.