



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1993

Honorable Libby Linebarger
Chair
Public Education Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-66

Re: Whether motions adopted by the Board of Trustees of the Employees Retirement System of Texas were subject to the rule-making and notice provisions of the Administrative Procedure and Texas Register Act, article 6252-13a, V.T.C.S. (ID# 20035)

Dear Representative Linebarger:

You ask whether certain motions adopted by the Board of Trustees (the "board") of the Employees Retirement System of Texas ("ERS") were subject to the rule-making and notice provisions of the Administrative Procedure and Texas Register Act, art. 6252-13a, V.T.C.S. ("APTRA"). By way of background, you note that in 1991, the 72d legislature amended article 3.50-2 of the Insurance Code to authorize school districts to elect to participate in insurance plans offered to state employees. *See* Acts 1991, 72d Leg., ch. 391, § 47, at 1495. Section 3A of that article states in pertinent part:

(a) A school district may elect to participate in the plans, programs, and coverages offered to active state employees under this Act. A district that elects to participate must accept the schedule of costs adopted by the trustee.

(b) If the trustee¹ determines that participation of school district employees in the plans of group coverages offered under this Act to state employees would have a significant adverse impact on the plans, programs or coverages offered to state employees, the trustee may establish separate plans of group coverages for school district employees. If separate plans of group coverages for school district employees are established, school district employees may not participate in the plans of group coverages offered under this Act to state employees. In establishing and administering the separate plans for school district employees, the trustee, the executive director of the Employees Retirement System of Texas, and the State Board of Insurance have all the powers and duties assigned to them under this

¹In section 3A, "trustee" means the ERS Board. Ins. Code, art. 3.50-2, § 3(a)(11).

Act in relation to plans, programs, and coverages offered to state employees.

(c) The trustee may assess a participating school district a fee to cover administrative costs if state funds are not appropriated for this purpose.

Ins. Code, art. 3.50-2, § 3A, as added by Acts 1991, 72d Leg., ch. 391, § 47, at 1495 (footnote added). On August 26, 1992, the board passed a number of motions relevant to implementing this legislation. You ask whether these motions were subject to APTRA's rule-making and notice provisions.

APTRA defines a "rule" as follows:

any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures.

V.T.C.S. art. 6252-13a, § 3(7). APTRA provides that prior to adopting any rule, an agency must give at least 30 days' notice of its intended action, *id.* § 5(a), and must afford all interested persons an opportunity to comment in writing, *id.* § 5(c), and, in some cases, at a hearing, *id.* Furthermore, on adoption of a rule, an agency, in some circumstances, must issue a concise statement of the principal reasons for and against its adoption, either prior to adoption or within 30 days after adoption. *Id.* The agency order finally adopting a rule must include a reasoned justification for the rule, a concise restatement of the particular statutory provisions under which the rule is adopted, and a certification that the rule has been reviewed by legal counsel and "found to be a valid exercise of the agency's legal authority." *Id.* § 5(c-1). APTRA also provides as follows:

No rule hereafter adopted is valid unless adopted in substantial compliance with this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced within two years after the effective date of the rule.

Id. § 5(e).

Whether the foregoing requirements apply to the board's August 26, 1992 motions turns on whether those motions were "rules" for purposes of APTRA. We believe, however, whether the August 26, 1992 motions were rules subject to APTRA is a moot issue. Since that date, ERS has adopted rules under APTRA to implement section 3A of article 3.50-2 of the Insurance Code. *See* Emp. Ret. Sys., 17 Tex. Reg. 7495 (1992),

adopted 18 Tex. Reg. 1289 (1993) (to be codified at 34 T.A.C. ch. 83).² Those rules establish the "Texas Public School District Insurance Plan" separate and apart from coverage offered to state employees, and appear to supplant the motions. If this is the case, even if the motions were in violation of APTRA and could be invalidated under APTRA, section 5(e), the rules which implement the motions would still be valid. Moreover, the legislature recently repealed section 3A of article 3.50-2 of the Insurance Code as of September 1, 1993. *See* Acts 1993, 73d Leg., ch. 791, § 56(3) (effective September 1, 1993).

S U M M A R Y

Because certain motions adopted by the Employees Retirement System of Texas appear to have been supplanted by ERS rules, *see* Emp. Ret. Sys., 17 Tex. Reg. 7495 (1992), *adopted* 18 Tex. Reg. 1289 (1993) (to be codified at 34 T.A.C. ch. 83), and because recent legislation repealed section 3A of article 3.50-2 of the Insurance Code, *see* Acts 1993, 73d Leg., ch. 791, § 56(3) (effective September 1, 1993), the question whether the motions were rules subject to the Administrative Procedure and Texas Register Act, article 6252-13a, V.T.C.S., is moot.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

²We assume for purposes of this opinion that these rules were enacted in conformance with APTRA.