



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

June 2, 2022

OAG-01-22

The Honorable Tony Evers
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Evers:

¶ 1. You have requested an opinion regarding the power of the University of Wisconsin Hospitals and Clinics Authority (the “Authority”) to voluntarily engage in collective bargaining with an organization chosen by a majority of nurses it employs. Your request notes that the Authority is not mentioned in chapter 111 of the Wisconsin Statutes, which governs employment relations and collective bargaining. If that lack of express reference means that the Authority is not covered by chapter 111’s collective bargaining provisions, you posit that the Authority is not prohibited from voluntarily engaging in bargaining, as state law would neither require nor prohibit it.

¶ 2. Before addressing your question about voluntary bargaining, I discuss a threshold issue of whether chapter 111’s mandatory collective bargaining provisions apply to the Authority, meaning it would be required to bargain. Although this opinion does not reach a conclusion on this issue, it appears that the Authority would be covered by the plain language of chapter 111’s subchapter known as the Peace Act. As to the direct question you pose, even assuming the Authority is not covered by the Peace Act—and, thus, is not required to collectively bargain—then it would still have the power to voluntarily bargain. The Authority has broad powers to contract with its employees and set their terms of employment, and it could choose to do so via a voluntary collective bargaining process.

¶ 3. Your request involves statutory interpretation, which applies the language of the statute. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is given its common,

ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The statutory language is “interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* ¶ 46. If this textual analysis “yields a plain, clear statutory meaning, then there is no ambiguity,” and the statute should be applied according to that plain meaning. *Id.* Courts may not “disregard the plain, clear words of the statute.” *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). Similarly, a court cannot “read into the statute words the legislature did not see fit to write.” *Dawson v. Town of Jackson*, 2011 WI 77, ¶ 42, 336 Wis. 2d 318, 801 N.W.2d 316.

Applicability of the Peace Act

¶ 4. In determining what power or obligation the Authority has under Wisconsin law to engage in collective bargaining, the threshold question is whether the Authority is covered by the Peace Act. This issue was not the central focus of the submissions that have been made regarding this matter, and this opinion does not reach a formal conclusion on this issue. Nevertheless, because a court would begin its analysis with this issue and it could render moot the question whether the Authority may voluntarily engage in collective bargaining, this opinion preliminarily analyzes whether the Authority is covered by the Peace Act.

¶ 5. The Peace Act grants employees statutory rights “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining.” Wis. Stat. § 111.04(1). In turn, it provides processes for “collective bargaining,” which is defined as “the negotiation by an employer and a majority of the employer’s employees in a collective bargaining unit . . . concerning representation or terms and conditions of employment.” Wis. Stat. § 111.02(2).

¶ 6. The Peace Act’s coverage of employers and employees is broad. An “[e]mployee” means “any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise.” Wis. Stat. § 111.02(6)(a). Its coverage of employers is equally broad: “[e]mployer” means “a person who engages the services of an employee.” Wis. Stat. § 111.02(7)(a).

¶ 7. There are only two exceptions in the Peace Act’s definition of “employer”: (1) for the “state or any political subdivision thereof” and (2) for a “labor organization.” Wis. Stat. § 111.02(7)(b). The exceptions for the state and political subdivisions exist because different subchapters specifically address state employees and employers (subchapter V, the State Employment Labor Relations Act, commonly known as SELRA) and municipal employees and employers (subchapter IV, the Municipal Employment Relations Act, commonly known as MERA). SELRA covers, with certain exceptions, “[a]ny state employee in the classified service of the state” and other listed state employees, and it binds “the state of Wisconsin” as an “employer.” Wis. Stat. § 111.81(7), (8). MERA defines its coverage of employers as including “any city, county, village, town . . . or any other political subdivision of the state.” Wis. Stat. § 111.70(1)(j).

¶ 8. Where a statute provides a “specific exception,” courts will not read additional ones into it. Courts presume “that the legislature intended to exclude other exceptions.” *Town of Clayton v. Cardinal Constr. Co.*, 2009 WI App 54, ¶ 16, 317 Wis. 2d 424, 767 N.W.2d 605 (citation omitted). Restated, “if [a] statute specifies one exception to a general rule . . . , other exceptions or effects are excluded.” *Georgina G. v. Terry M.*, 184 Wis. 2d 492, 512, 516 N.W.2d 678 (1994) (first alteration in original) (citation omitted).

¶ 9. Given that the Authority is not a labor organization, to determine the Peace Act’s coverage, a court would examine whether the Authority fits into the specific employer exceptions for the “state” or “a political subdivision thereof.” Otherwise, the statute’s coverage would apply by default, as it does for all other employers.

¶ 10. Multiple sources support that the Authority is not the “state.” Rather, it is a “public body corporate and politic,” also known as a “political corporation,” and it has characteristics in common with an “independent going concern.” Wis. Stat. § 233.02(1); *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 31, 302 Wis. 2d 358, 735 N.W.2d 30; *Mayhugh v. State*, 2015 WI 77, ¶ 13, 364 Wis. 2d 208, 867 N.W.2d 754. In ruling that the Authority is a “political corporation,” the Wisconsin Supreme Court has explained that the Authority has “[s]ome features . . . shared with private entities”: for example, it does not receive general purpose revenue from the state; it can sue and be sued; and it can buy and sell real estate. *Rouse*, 302 Wis. 2d 358, ¶ 32.

¶ 11. The court has further explained that an entity with those kinds of characteristics is an “independent going concern”—an entity that is not an arm of the state because it is “an entity independent from the state.” *Mayhugh*, 364 Wis. 2d 208, ¶ 13. Like the Authority, such entities have powers to independently buy and sell real estate, sue and be sued, and take on debt, and they are not funded through general purpose revenue; such entities’ liabilities thus are not the state’s liabilities. *See id.* ¶¶ 15–16; Wis. Stat. § 233.03(11)–(16). For example, the Wisconsin Supreme Court held that the State Armory Board—which, like the Authority, is a “body politic and corporate”—was an independent going concern, as it can convey real estate, hold and disburse its own funds, and issue bonds. *Mayhugh*, 364 Wis. 2d 208, ¶ 18 (citation omitted); *see* Wis. Stat. § 233.02(1) (designating the Authority as “a public body corporate and politic”). The “designation of the Board as a body politic and corporate, combined with the Board’s broad proprietary powers, rendered it an independent going concern,” and not an arm of the state. *Mayhugh*, 364 Wis. 2d 208, ¶ 18. In a further example, the court explained that the State Housing Finance Authority was an independent going concern because it was “a public body corporate and politic” with all “necessary or convenient” powers including the power to sue and be sued, incur debt, issue bonds, enter leases, and acquire property. *Id.* ¶ 19–20 (citations omitted); *see also id.* ¶¶ 21–22 (providing a similar explanation as to the State Investment Board). Again, those key features are all true of the Authority. *See* Wis. Stat. § 233.02(1) (stating it is a “public body corporate and politic”); Wis. Stat. § 233.03 (vesting all powers “necessary or convenient”); Wis. Stat. § 233.03(2) (stating that the Authority can “[s]ue and be sued” and can “negotiate and enter leases”); Wis. Stat. § 233.03(11)–(16) (setting out the Authority’s powers to issue bonds, acquire and construct facilities, and buy, sell, and lease real estate).

¶ 12. Consistent with the supreme court’s explanations, the statutes treat “political corporations” as separate from the “state.” For example, one statute governs notices of legal claims against “state employees” and state agents, Wis. Stat. § 893.82, whereas a separate statute, Wis. Stat. § 893.80, governs claims against a “political corporation” or other non-state entities, like governmental subdivisions. Likewise, the Seventh Circuit has denied the Authority the ability to invoke Wisconsin’s sovereign immunity, which protects an “arm of the state.” In doing so, that court observed that the Authority has the nature of an “independent, nonprofit entity,” which “Wisconsin’s own courts would classify . . . as private” because of its “financial autonomy and the authority to sue and be sued in its own name.” *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005).

¶ 13. The Authority also is not a political subdivision of the state. Although not defined in the Peace Act, the statutes elsewhere use the term “political subdivision” to refer to a “city, village, town, or county” or another municipal entity, consistent with MERA’s coverage. *See* Wis. Stat. § 66.0628(1)(a) (defining “political subdivision”); *see also* Wis. Stat. §§ 66.0505(1)(b), 85.064(1)(b), 86.312(1)(c), 91.01(24), 196.5045(1), 299.50(1)(d), 229.821(11), 700.28(1). Because the Authority is none of those things, that exception would not apply.

¶ 14. Thus, the cases support that the Authority is neither the “state” nor a “political subdivision,” and so it does not appear to be exempt from the Peace Act’s express coverage. The Peace Act has no exception for a “public body corporate and politic,” a “political corporation,” or an “independent going concern.” And the Peace Act provides that where it is not “clearly indicate[d] otherwise,” its coverage “shall not be limited to the employees of a particular employer.” Wis. Stat. § 111.02(6)(a).

¶ 15. While a Wisconsin Legislative Council memorandum states that the Authority is not covered by the Peace Act, Wis. Legis. Council, Memo, *Union Negotiations with University of Wisconsin Hospitals and Clinics Authority* (Oct. 4, 2021),¹ that memorandum does not look to the statutory text but instead relies on assumptions about statutory history and legislative history. That approach overlooks the key task in statutory interpretation: reading the text of the statute.

¶ 16. Although statutory history may be considered as part of statutory context, *see State v. Williams*, 2014 WI 64, ¶ 17, 355 Wis. 2d 581, 852 N.W.2d 467, conclusions drawn from statutory history cannot change what the text states. Of particular relevance here, an exclusion cannot be “read into the statute.” *Dawson*, 336 Wis. 2d 318, ¶ 42. But the Legislative Council analysis appears to do just that.

¶ 17. Further, the statutory and legislative history referred to in the Legislative Council memorandum do not clearly support the memorandum’s conclusion.

¶ 18. As to statutory history, the Legislative Council memorandum points to 2011 Wis. Act 10’s removal of the Authority as affirmatively included in the definition of an employer under the Peace Act. The Legislative Council memorandum assumes

¹ Wis. Legis. Council, Memo, *Union Negotiations with University of Wisconsin Hospitals and Clinics Authority* (Oct. 4, 2021), <https://wisconsinsexaminer.com/wp-content/uploads/2021/12/Updated-Leg-Council-Memo-RE-UWHCA-Collective-Bargaining.10.4.21pdf.pdf>.

that there is only one explanation for Act 10's removal of the express reference—to exclude the Authority from the Peace Act's coverage. But that is not the only possible explanation.

¶ 19. The Authority was added to the definition of an employer under the Peace Act in 1995, when the Authority split off from the state. At the time the Authority split from the University of Wisconsin, hospital and clinic employees were treated as a mixture of Authority and state employees, 1995 Wis. Act 27, § 9159(4), with the Authority employees covered by the Peace Act and the state employees employed by the Hospital and Clinics Board covered by SELRA. 1995 Wis. Act 27, § 224m (creating Wis. Stat. § 15.96); Wis. Stat. § 111.815 (2009–10) (including the Board under SELRA). That mixture ended with Act 10. 2011 Wis. Act 10, §§ 12 (repealing Wis. Stat. § 15.96), 377 (removing the language in Wis. Stat. § 233.10(1) that limited the Authority's employment powers as previously stated in 1995 Wis. Act 27, § 9159(4)). That meant that language clarifying whether the Authority fell under the Peace Act was no longer needed. If the Legislature meant to do more—for the Authority to be uniquely exempt from coverage under the Peace Act—one would expect the text of the statute to say so.

¶ 20. As to legislative history, the Legislative Council memorandum cites to statements in the legislative history files concluding that 2011 Wis. Act 10 removed bargaining rights for the Authority's employees. However, Act 10 changed many statutory provisions that applied to the Authority, and the comments in the legislative history do not explain which provisions of Act 10 they refer to. For example, the pre-Act 10 statutes included special bargaining rights for Authority employees, beyond the basic terms of the Peace Act. *See* Wis. Stat. § 111.05(5) (2009–10). Act 10 eliminated those special rights. 2011 Wis. Act 10, § 195. Since the comments do not explain which bargaining rights they refer to or provide any analysis, it requires speculation to interpret them.

¶ 21. In any event, the legislative history may not be used “to vary or contradict” statutory text. *Kalal*, 271 Wis. 2d 633, ¶ 51. And, again, it would have been straightforward to expressly exempt the Authority from the Peace Act—just like the “state” and “political subdivisions thereof” are expressly exempted.

¶ 22. In sum, although this opinion does not conclusively opine on the issue, it appears that the Peace Act applies based on the statute's plain language.

Authority to voluntarily bargain

¶ 23. Assuming that the Peace Act would not mandate collective bargaining, the Authority at a minimum has the power to voluntarily bargain.

¶ 24. Chapter 111’s bargaining provisions contain both mandates and restrictions for employers covered under the Peace Act, MERA (for municipal employers), or SELRA (for state employers). For example, under MERA, a covered “municipal employer is prohibited from bargaining collectively” on “[a]ny factor or condition of employment except wages.” Wis. Stat. § 111.70(4)(mb). SELRA imposes similar restrictions on the state of Wisconsin as employer: “The employer is prohibited from bargaining with a collective bargaining unit containing a general employee with respect to . . . [a]ny factor or condition of employment except wages.” Wis. Stat. § 111.91(3).

¶ 25. While chapter 111 contains these specific, explicit restrictions applicable to certain employers, it contains no overarching prohibition on bargaining that would apply to an employer not covered by the restrictions. That is highly significant under the rules of statutory construction. Words cannot be “read into” a statute. *Dawson*, 336 Wis. 2d 318, ¶ 42. That is doubly true where a statute has different, specific exemptions or restrictions. *Town of Clayton*, 317 Wis. 2d 424, ¶ 16. The Legislature knew how to prohibit a bargaining practice—there is express language doing just that for certain employers. It did not provide those prohibitions for employers not covered by SELRA or MERA.

¶ 26. As part of the public comment opportunity for the opinion request, the Authority submitted a comment citing two sources that it asserts support that it may not voluntarily bargain. Neither supports that position because each involved specific statutory prohibitions on bargaining. In *LaCroix v. Kenosha Unified School District Board of Education*, No. 13CV1899 (Wis. Cir. Ct. Kenosha Cnty. Mar. 19, 2015), the circuit court ruled that a covered municipal employer could not bargain contrary to the express “prohibit[ion]” in MERA. In the other source, the Supreme Court of New Hampshire ruled that a statute providing that “[i]n no case shall [the entity overseeing bargaining] certify a bargaining unit” of a certain composition prevented an entity from recognizing those uncertified bargaining units. *Pro. Fire Fighters of Wolfeboro, IAFF Loc. 3708 v. Town of Wolfeboro*, 48 A.3d 900, 904 (N.H. 2012) (citation omitted).

¶ 27. Rather than support the Authority’s position that it may not voluntarily bargain, these examples demonstrate what is missing here. The Authority is not a state employer covered by SELRA or a municipal employer covered by MERA, and so any restrictions for employers covered by those subchapters do not apply. There is no prohibition that applies to the Authority or its employees similar to those in the cited cases.

¶ 28. Not only is there no statutory bar to voluntary bargaining, but the statutes governing the Authority’s powers plainly encompass bargaining as a means to contract with its employees. By statute, the “authority shall have all the powers necessary or convenient to carry out the purposes and provisions of [chapter 233].” Wis. Stat. § 233.03. That is consistent with the powers generally vested in corporations in Wisconsin “to do all things necessary or convenient to carry out its business and affairs.” Wis. Stat. § 180.0302. Among other powers, the Authority is broadly authorized to employ an employee and “fix his or her compensation and provide any employee benefits,” Wis. Stat. § 233.03(7), and to implement “employment policies for employees,” Wis. Stat. § 233.04(2). It “shall employ such employees as it may require and shall determine the qualifications and duties of its employees.” Wis. Stat. § 233.10(1). And, as a general matter, the Authority is empowered to “[a]dopt bylaws and policies and procedures for the regulation of its affairs and the conduct of its business” and to “make and execute . . . instruments necessary or convenient to the exercise of [its] powers.” Wis. Stat. § 233.03(1), (2). The term “instrument” means a “written legal document that defines rights, duties, entitlements, or liabilities.” *Instrument*, Black’s Law Dictionary (11th ed. 2019); see *Kalal*, 271 Wis. 2d 633, ¶ 53 (explaining that plain meaning may be “ascertainable by reference to the dictionary definition”). This power to execute a legal document (an “instrument”) defining rights and duties would encompass a collective bargaining agreement.

¶ 29. Thus, the Authority is expressly and broadly empowered to determine the terms of its relationship with its employees and to enter into agreements defining rights or duties it agrees to.² One means of carrying out these broad statutory powers would be to reach terms of employees’ employment through collective bargaining. Of course, that still must happen within the constraints of statutes that do exist. For

² As the Wisconsin Supreme Court has reiterated, even state agencies are empowered to act on these kinds of “explicit but broad” grants of statutory authority. *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 71, ¶ 25, 398 Wis. 2d 386, 961 N.W.2d 346. That is even more true for a “political corporation” or an “independent going concern,” which are vested with broad independent powers beyond what is vested in an arm of the state, as discussed in the text.

example, “[a]ppointments to and promotions in the authority shall be made according to merit and fitness.” Wis. Stat. § 233.10(1). Voluntary bargaining would need to occur within the bounds of that provision and the surrounding statutory framework.

¶ 30. In addition to the statutory text, other authorities support this result, including a previous opinion from this office. In 59 Op. Att’y Gen. 200 (1970), the Attorney General addressed the University of Wisconsin’s voluntary recognition of a teaching assistants’ association. *Id.* at 201. UW-Madison had “voluntarily recognized” the association and “agreed to negotiate and contract . . . as though [chapter 111] were applicable.” *Id.* The opinion concluded that the contract was “legal and binding” under Wisconsin law, citing the broad statutory powers of the Board of Regents, who “clearly have the authority to enter into individual contracts” and, in turn, could enter into an agreement “which establishes the framework and standards of the individual employment contracts” as “an integral part of . . . contracting for personnel.” *Id.* at 202–04. Restated, “collective bargaining is an adjunct to individual employment contracts” and thus was within the Board of Regents’ existing statutory power to contract with employees. *Id.* at 205–06.

¶ 31. Various courts have agreed with those principles. Indiana’s court of appeals addressed a scenario where a school district adopted a voluntary policy for collective bargaining with employees despite neither state nor federal law requiring it. *Mich. City Area Sch. v. Siddall*, 427 N.E.2d 464 (Ind. Ct. App. 1981). The court agreed that the district was authorized to do so voluntarily under its statutory authority to fix terms of its employees’ employment. *Id.* at 466. The court explained that while the district had “no legal obligation to engage in collective bargaining with the . . . employees,” it “may do so voluntarily, and accordingly could properly declare qualifications or restrictions establishing a basis upon which it would agree to bargain collectively.” *Id.* at 468. As another example, the Eighth Circuit held that a city could contract for additional benefits for employees regardless of the narrower coverage of a particular statutory bargaining law. *Am. Fed’n of State, Cnty. & Mun. Emps. v. City of Benton*, 513 F.3d 874, 881 (8th Cir. 2008). The court recognized that such a contract does not “contract away its right to manage the fiscal matters of the City” but rather is an “exercise[]” of its “functions.” *Id.* Similarly, Utah’s court of appeals held that a school board could choose to collectively bargain under its statutory authority to enter into employment contracts. *Park City Educ. Ass’n v. Bd. of Educ. of Park City Sch. Dist.*, 879 P.2d 267 (Utah Ct. App. 1994). There, too, the bargaining did not delegate its statutory powers but rather was an exercise of them. *Id.* at 269–71 (collecting cases stating the weight of authority); *see also Del. River Port Auth. v. Fraternal Ord. of Police*, 290 F.3d 567, 574 n.11 (3d Cir. 2002) (noting that

where an entity was under no “legal duty” to bargain, it was “free to voluntarily recognize and bargain collectively with” employees (citation omitted).³

¶ 32. As observed in these many court decisions,⁴ collective bargaining is simply a method of carrying out existing statutory authority to enter into employment agreements.

³ For these reasons and additional ones, the present scenario does not involve improperly contracting away public powers, as the Authority posits in its comment letter. Rather, the cases the Authority cites are distinct, addressing municipalities’ contracting away the state’s sovereign powers. *See Adamczyk v. Town of Caledonia*, 52 Wis. 2d 270, 275, 190 N.W.2d 137 (1971) (discussing the distinct scenario where a town purported to contract away the “the state’s sovereign[]” power to remove certain officers without cause); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 80, 205 N.W.2d 784 (1973) (stating that a municipality may contract away its business or propriety powers but may not contract away its governmental powers). As the authorities in the text make clear, the bargaining discussed here is a method of *exercising* a statutory power—determining and entering into an employment agreement—and does not involve contracting away any powers, much less the state’s sovereign ones.


⁴ To the extent that the Authority’s contentions about the practicality of voluntarily engaging in collective bargaining bear on the question of whether the Authority is permitted to collectively bargain, these and other sources demonstrate that employers have indeed successfully implemented voluntary collective bargaining agreements. *See supra* ¶ 31; *see also City of Phoenix v. Phx. Emp. Rels. Bd. ex rel. Am. Fed’n of State, Cnty. & Mun. Emps. Ass’n, Loc. 2384*, 699 P.2d 1323, 1327 (Ariz. Ct. App. 1985) (discussing the establishment of an ordinance modeled after the National Labor Relations Act); Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 Cornell J.L. & Pub. Pol’y 735, 752 (2009) (discussing memoranda of agreement with employers); Martin H. Malin, *Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?*, 96 Marq. L. Rev. 623, 641–55 (2012) (discussing various agreements and models).

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Conclusion

¶ 33. In summary, although this opinion does not reach a conclusion on the issue, it appears that the Peace Act includes the Authority in its coverage based on the statute's plain text. Assuming that the Authority is not covered by the Peace Act, I conclude that it is within the Authority's statutory power to voluntarily engage in collective bargaining.⁵

Sincerely,



Joshua L. Kaul
Attorney General

JLK:ADR:jrs

⁵ Your request does not seek an opinion on, and this opinion does not address, what relevance, if any, federal law may have to the issues discussed here. As this office's guidance has long stated, Attorney General opinion requests generally are not appropriate on questions of federal law. *See* 77 Op. Att'y Gen. Preface (1988).



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

114 East, State Capitol
PO Box 7857
Madison WI 53707-7857
(608) 266-1221
TTY 1-800-947-3529

August 22, 2022

OAG-02-22

The State of Wisconsin Investment Board
c/o Chief Counsel Sara Chandler
121 East Wilson Street
Post Office Box 7842
Madison, WI 53703

Dear Chief Counsel Chandler:

¶ 1. On behalf of the State of Wisconsin Investment Board (“SWIB”), you ask for clarification about the scope of a previous attorney general opinion, Wis. Op. Att’y Gen. OAG—11—08 (Dec. 16, 2008) (“2008 Opinion”).¹ That opinion addressed SWIB’s expanded authority through statutory amendments in 2007 Wis. Act 212 (“2008 Amendments”). The opinion discussed the 2008 Amendments’ effect on SWIB’s investment authority over Wisconsin’s core retirement investment trust fund (the “Core Fund”). Specifically, the opinion stated that the 2008 Amendments broadly authorized SWIB to manage the assets in the Core Fund in any manner consistent with the statutory “prudent person” standard in Wis. Stat. § 25.15(2) (2019–20)², regardless of whether a particular management approach was specifically listed in the statutes.

¶ 2. You now ask for an opinion clarifying whether SWIB’s expanded authority over the Core Fund includes issuing debt. Debt issuance, as you explain, is one type of a broader management strategy known as leveraging, which is when an entity invests more capital than cash on hand. You offer the following

¹ As observed in Wis. Op. Att’y Gen. OAG—11—08 (Dec. 16, 2008) (“2008 Opinion”), public trustees may seek guidance from the Attorney General via an opinion request. *See Wis. Retired Tchrs. Ass’n, Inc. v. Employee Tr. Funds Bd.*, 207 Wis. 2d 1, 26, 558 N.W.2d 83 (1997).

² All subsequent references to the Wisconsin Statutes are to the 2019–20 version unless otherwise indicated.

explanations for why SWIB is considering issuing debt. You explain that SWIB already engages in other types of leveraging, such as investing in instruments that can be bought without full payment at the date of purchase and by using securities it currently owns as collateral. SWIB desires to also use debt leveraging as part of an overarching diversified asset allocation strategy, with the goal of improving the fund's efficiency, increasing returns, and decreasing overall risk. Further, the debt SWIB issues would come with a right of recourse only against the Core Fund. The request points out that some other large pension plans, including some in Canada, use debt issuance as part of their management strategies. For example, the Canada Pension Plan explains that it includes debt leveraging in its portfolio to ensure proper diversification and to target a specific level of overall risk.³ Any such actions would be subject to continual oversight by SWIB staff and approval by its Board of Trustees. Your request states that SWIB believes it has the authority to leverage by issuing debt, but that it seeks an opinion making that explicit because parties involved in the debt-issuance process may require such assurances.

¶ 3. I conclude that, based on the same reasoning in the 2008 Opinion, SWIB has the statutory authority to issue debt as part of its broad Core Fund management authority, provided that the statutory “prudent person” standard is met. Whether, in a particular situation, issuing debt meets that standard would depend on the specific circumstances. This opinion does not address whether issuing debt would in fact meet the standard in any particular scenario.

Background on SWIB's powers, the 2008 Amendments, and the 2008 attorney general opinion.

¶ 4. As discussed in OAG—11—08, the 2008 Amendments vested SWIB with broad authority over the Wisconsin Retirement System's Core Fund and, to a certain extent, its variable fund, the latter of which is not at issue here. Both funds are maintained by SWIB “for the purpose of managing the investments of the retirement reserve accounts,” which relates to the Wisconsin Retirement System. Wis. Stat. § 40.04(3); *see also* Wis. Stat. § 40.20 (creating the retirement system). State employers are included in the system, and other public employers may be.

³ *Debt Issuance*, CPP Investments, <https://www.cppinvestments.com/the-fund/debt-issuance> (last visited July 27, 2022). There are also reports that California's state retirement system has resolved to issue debt to fund investments, allowing it to have 105% of its funds available for investment. Simon Moore, *Major Pension Fund Adds Leverage As Assets Push Half A Trillion*, *Forbes*, (Nov. 16, 2021, 2:01 PM), <https://www.forbes.com/sites/simonmoore/2021/11/16/major-pension-fund-adds-leverage-as-assets-push-half-a-trillion/?sh=8b3721427ele>.

See Wis. Stat. §§ 40.02(28) (defining employer), 40.21 (setting out participating employers), 40.22(1) (setting out participating employees). SWIB has “exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from . . . [the Core Fund].” Wis. Stat. § 25.17(1)(br). To that end, there are provisions setting out specific investment options, such as Wis. Stat. § 25.17(3)(a), which authorizes investment in “loans, securities, and any other investments authorized by s. 620.22,” which, in turn, refers to that section’s inclusion of “[p]referred or common stock of any United States or Canadian corporation,” Wis. Stat. § 620.22(3), among other types of investments.

¶ 5. The funds are self-contained: “All costs of owning, operating, protecting, and acquiring property in which either trust has an interest shall be charged to the current income or market recognition account of the trust” Wis. Stat. § 40.04(3). The statutes further state that “[a]ny deficit occurring within the accounts of a benefit plan,” which includes the retirement system’s Core Fund, “shall be eliminated as soon as feasible by increasing the premiums, contributions or other charges applicable to that benefit plan.” Wis. Stat. §§ 40.04(1), 40.02(10) (defining benefit plan), 40.04(2) (setting out accounts and reserves).

¶ 6. Prior to the 2008 Amendments, SWIB had specifically listed investment powers, including when it came to the Core Fund. For example, as noted above, Wis. Stat. § 25.17(4) allows SWIB to invest “the funds of the [Core Fund] in loans, securities, or investments.” This office had opined in the past that, under the pre-2008 statutes, SWIB’s powers were only as specifically enumerated in those kinds of statutory lists. See 60 Op. Att’y Gen. 266 (1971); 78 Op. Att’y Gen. 189 (1989). This was sometimes called the “legal list.”

¶ 7. However, as the 2008 Opinion explains, the 2008 Amendments changed SWIB’s powers. Specifically, 2007 Wis. Act 212 created Wis. Stat. § 25.182, which broadly and expressly vested SWIB with management authority over the Core Fund in addition to, and notwithstanding, any other statute, provided that SWIB’s exercise of that authority complied with the “prudent person” standard in Wis. Stat. § 25.15(2):

In addition to the management authority provided under any other provision of law, and notwithstanding any limitation on the board’s management authority provided under any other provision of law, the board shall have authority to manage the money and property of the core retirement investment trust and, subject to s. 25.17 (5), the

variable retirement investment trust *in any manner that does not violate the standard of responsibility specified in s. 25.15 (2)*.

Wis. Stat. § 25.182. As the emphasized language makes plain, and as recognized in the 2008 Opinion, this language expressly removes other limits on SWIB's Core Fund management authority. It does so in two ways, by stating that SWIB's management authority over the Core Fund: (1) is "in addition to" other authority and (2) operates "notwithstanding" any other statutory limits. OAG—11—08.

¶ 8. Rather, the current limit is the standard of responsibility in Wis. Stat. § 25.15(2). It establishes a "prudent person" management standard based on professionals acting in similar capacities, and it also calls for diversity of investment and for SWIB to administer trusts solely for the purposes of the trust:

Except as provided in s. 25.17 (2) and (3) (c), the standard of responsibility applied to the board when it manages money and property shall be all of the following:

(a) To manage the money and property with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity, with the same resources, and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims.

(b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trust's or fund's portfolio as a whole at any point in time.

(c) To administer assets of each trust or fund solely for the purpose of ensuring the fulfillment of the purpose of each trust or fund at a reasonable cost and not for any other purpose.

Wis. Stat. § 25.15(2).

¶ 9. The 2008 Amendments also altered section 25.15(2) in two other ways. First, prior to the amendment, the introductory sentence provided that the standard of responsibility applied to "the board when it *invests* money or property." Wis. Stat. § 25.15(2) (2005–06). The amendment removed the more limited term "invests" and substituted the broader word "manages." Second, similarly, section 25.15(2)(a) used

to direct SWIB “[t]o invest, sell, reinvest and collect income and rents” according to the “prudent person” standard. Wis. Stat. § 25.15(2)(a) (2005–06). The amendment removed that more limited list and substituted the general language directing SWIB “[t]o manage the money and property” according to the “prudent person” standard. Wis. Stat. § 25.15(2)(a).

¶ 10. The 2008 Opinion also explains that legislative history reinforces the statutory text. A contemporaneous Legislative Reference Bureau analysis explained that, “instead of its investment authority being limited to the authorized lists, SWIB may manage the money and property of the core trust . . . in any manner that does not violate SWIB’s standard of responsibility.” OAG—11—08, at 5 (quoting Analysis by Wis. Legis. Reference Bureau of 2007 Wis. Assemb. B. 623).

¶ 11. The opinion thus concluded that the 2008 Amendments authorized SWIB to act according to “the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not on the ‘legal list.’” OAG—11—08, at 6.

SWIB’s statutory authority to issue debt is subject to same analysis of its management authority described in Wis. Op. Att’y Gen. OAG—11—08.

¶ 12. Your opinion request asks whether SWIB has the authority to issue debt as a management strategy for the Core Fund. You explain that SWIB would issue the debt, which it believes can be done “at attractively low interest rates” given its strong financial circumstances, and then invest the proceeds.

¶ 13. I conclude, based on the plain text of the statutes summarized above, that SWIB would have the authority to issue debt provided it satisfies the “prudent person” and other standards listed in Wis. Stat. § 25.15(2). The statutory standards apply the same way to issuing debt as a management tool as they apply to any other strategy.

¶ 14. The meaning of provisions in Wis. Stat. ch. 25 presents a question of statutory interpretation. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *Id.* “If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its

meaning.” *Id.* (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). Ascertaining the plain meaning may be aided by “reference to the dictionary definition.” *Id.* ¶ 53.

¶ 15. Further, statutory history—“the previously enacted and repealed provisions of a statute”—is part of a plain-meaning contextual analysis. *County of Dane v. Lab. & Indus. Rev. Comm’n*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581). Lastly, extrinsic legislative history, while not part of a plain meaning analysis, may be consulted to confirm that analysis. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 51.

¶ 16. That framework was properly applied in the 2008 Opinion, which addressed the plain meaning of the statutory terms in the 2008 Amendments that explicitly broadened SWIB’s management authority over the Core Fund. The opinion further confirmed that plain meaning based on legislative history. I conclude that there is no reason to treat debt issuance differently. In other words, there is no statutory basis to limit the “prudent person” standard to categorically exclude debt issuance.

¶ 17. The “prudent person” standard refers to SWIB’s duty to “manage the money and property” of the Core Fund. Wis. Stat. § 25.25(2)(a). The term “manage” is not defined, so a court properly would resort to a dictionary. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 53 (explaining that a term’s meaning may be discerned “by reference to the dictionary definition”). The term broadly means “to handle or direct with a degree of skill.” *Manage*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/manage> (last visited July 27, 2022). Further, the statutory history shows that the Legislature removed more limited terms (“invest,” “sell”) and replaced them with the broader term, “manage.” Thus, there is no basis, either in the text or the statutory history, to limit the “prudent person” standard to the superseded statutory limits on investing in specific ways. Instead, SWIB is allowed to go beyond those specific limits so long as it handles the trust “with a degree of skill” contemplated by the “prudent person” standard.

¶ 18. The text of Wis. Stat. § 25.182 does not single out a management strategy as forbidden but broadly confers “management authority” “[i]n addition to” and “notwithstanding” any other grant or limit of authority in the statutes, provided the standards in Wis. Stat. § 25.15(2) are met. Thus, for issuing debt with recourse against the Core Trust, as with any strategy, the question is whether the

“prudent person” and other standards would be met under the circumstances. That is a fact-specific question that is beyond the scope of this opinion.

Consideration of the Wisconsin Constitution’s “public debt” restrictions.

¶ 19. Lastly, although your request does not ask for an analysis of the Wisconsin Constitution’s “public debt” limitations, for the sake of completeness, the following explains how the precedent would apply. This concerns the Wisconsin Constitution’s provision that, “[t]he state shall never contract any public debt except in the cases and manner herein provided.” Wis. Const. art. VIII, § 4.

¶ 20. The Wisconsin Supreme Court has ruled that the Wisconsin Constitution’s limits on “public debt” apply only when “the state itself is under a legally enforceable obligation.” *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 428, 208 N.W.2d 780 (1973). For example, *Nusbaum* addressed the Wisconsin Housing Finance Authority’s “powers and structure” and ruled it was an “independent entity” and was “neither an arm nor agent of the state.” *Id.* at 424–25. The court confirmed that the Legislature has the power to create such “separate entities” to accomplish a purpose that the State may not be able to achieve directly. *Id.* at 425. For example, when the Authority issued bonds, the State could not be held liable on them; rather, the debts were “satisfied out of rents and interest the Authority receives from the property the Authority acquires and the investments it makes.” *Id.* at 424.

¶ 21. The court ruled that this scenario did not constitute “public debt” because there was no “absolute obligation[] to pay money or its equivalent” running against “the state itself.” *Id.* at 427–28. Put differently, no legal obligation ran against the State “to be satisfied or discharged out of future appropriations.” *Id.* at 428–29. And the court further explained that it would not matter if the State might wish to help with the obligation in the future “at the state’s option,” provided there was “no presently binding legal obligation on the part of the state.” *Id.* at 429.

¶ 22. A similar analysis is found in other Wisconsin cases. *See Wis. Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 482, 235 N.W.2d 648 (1975) (holding that the issuance of bonds by the Wisconsin Solid Waste Recycling Authority to finance its programs was not “public debt” where there was no recourse against the State because “no state debt or pledge of state credit exists unless there is an obligation which is legally enforceable against the state”); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 64, 205 N.W.2d 784 (1973) (in the parallel municipal context, concluding there was no public debt where “bonds shall not

constitute nor give use to a pecuniary liability of the municipality or a charge against its general credit or taxing powers” but rather were payable out of a project).

¶ 23. Regarding SWIB’s status, the court of appeals has held that, like the Wisconsin Housing Finance Authority in *Nusbaum*, SWIB is not an arm of the State but is an “independent going concern” with “independent proprietary powers and functions.” *Bahr v. State Inv. Bd.*, 186 Wis. 2d 379, 388–89, 521 N.W.2d 152 (Ct. App. 1994) (discussing these principles in the context of sovereign immunity). The *Bahr* court observed that SWIB is designated “an independent agency of the state.” *Id.* at 396 (emphasis omitted) (quoting Wis. Stat. § 25.15(1)). Consistent with that, its operation and finances are a closed system. It is not funded by general state revenue but rather employers and employees contribute to the fund. Wis. Stat. § 40.05(1)–(2) (discussing employee and employer contributions). SWIB then has “exclusive control” and can, for example, act “to execute instruments indemnifying against its failures and losses, to secure insurance against any risks relating to its functions, to liquidate any corporation in which it owns 100% of the stock, [and] to sell stock and engage in a variety of financial and stock transactions.” *Bahr*, 186 Wis. 2d at 396–98. “In each instance, the expenses incurred in the exercise of these powers are to be paid by the board out of the current income of the particular fund for which the action is taken; no state-appropriated funds are involved.” *Id.* at 397.


¶ 24. Thus, like the Authority in *Nusbaum*, SWIB has the characteristics of an independent going concern whose Core Fund investment-management actions do not create debt payable by the State. Rather, obligations run against the funds, not the State, as in *Nusbaum*. That is consistent with the representations in SWIB’s request letter, which explains that any debt issuance it would engage in would explicitly be limited to recourse against the Core Fund and not the State.

¶ 25. As a final note, a previous opinion, 78 Op. Att’y Gen. 189, addressed SWIB’s powers prior to the 2008 Amendments discussed in OAG—11—08 and, in passing, made reference to whether SWIB was an independent going concern, suggesting it might not be. 78 Op. Att’y Gen. 189 addressed the constitutional limits on contracting debt for “internal improvements,” something that is not at issue in this request. *See id.* at 194, 197 (discussing internal-improvements analysis in *State ex rel. Dep’t of Dev. v. State Bldg. Comm’n*, 139 Wis. 2d 1, 12–13, 18, 406 N.W.2d 728 (1987), and reconfirming the separate analysis in *Nusbaum*). In the course of addressing that separate provision, this office opined, with little analysis, that SWIB did not “appear[]” to be an independent authority. 78 Op. Att’y Gen. at 195.

The only reasoning, however, was that SWIB was created to be in the executive branch. *Id.* at 195–96. As discussed above, the salient question posed by *Nusbaum* and answered by *Bahr* is whether an entity is created to be independent in its function. *Bahr* ruled that SWIB was indeed an “independent going concern” and not an “arm” of the State for the reasons summarized above. To the extent this office’s pre-*Bahr* comment in the context of internal improvements is in tension with the subsequent *Bahr* decision, *Bahr* is controlling.⁴

¶ 26. In sum, the analysis in Wis. Op. Att’y Gen. OAG—11—08 of SWIB’s broad management authority would apply equally to debt issuance as a management strategy for the Core Fund. SWIB would have the statutory authority to issue debt as part of its Core Fund management authority if the statutory “prudent person” standard is met. Whether a particular use of debt issuance meets the standards in Wis. Stat. § 25.15(2), including the “prudent person” standard, would depend on the circumstances.

Sincerely,



Joshua L. Kaul
Attorney General

JLK:ADR:jrs

⁴ Also, for the reasons discussed in this opinion and the 2008 Opinion, the discussion in 78 Op. Att’y Gen. 189 (1989) about a lack of authority “to borrow money for leverage purposes” no longer applies because SWIB’s statutory powers no longer are limited to an investment list. 78 Op. Att’y Gen. at 192; *see also* 60 Op. Att’y Gen. 266 (1971) (also addressing the superseded statutory scheme).