

N.D.A.G. Letter to Person (Aug. 11, 1987)

August 11, 1987

Mr. Alan Person
Executive Director
North Dakota Public
Employees Retirement System
1930 Burnt Boat Drive
Box 1214
Bismarck, ND 58502

Dear Mr. Person:

Thank you for your letter of July 16, 1987, in which you request my opinion on whether the North Dakota Public Employees Retirement System Board may borrow funds from the Bank of North Dakota or the Public Employees Retirement System to cover temporary cash flow shortages in the Uniform Group Medical Insurance Program.

The authority of a North Dakota state agency to borrow money was addressed in 1986 N.D. Op. Att'y Gen. 142. In that opinion, this office interpreted N.D. Const. art. X, § 13 as prohibiting Job Service North Dakota from borrowing funds, absent specific authorization by the Legislature for a clearly defined purpose.

Unlike Job Service North Dakota, however, the North Dakota Public Employees Retirement System Board "has the powers and privileges of a corporation." N.D.C.C. § 54-52-04(1). This office has interpreted similar statutory authority as sufficient authorization for an agency or instrumentality of the state to borrow money.

In a December 8, 1983, letter to the North Dakota State Fair Association, then Deputy Attorney General Calvin N. Rolfson answered the question whether the Association had the authority to borrow money from the Bank of North Dakota as follows:

I have reviewed section 4-02.1-16 of the North Dakota Century Code which provides that the Association shall possess all of the rights and privileges as do business corporations except as may be specifically limited by law. Business corporations, under section 10-19-04(8), N.D.C.C., have the authority to borrow money. I am unable to find any specific statute which prohibits the Association from enjoying this particular corporate privilege and authority. Thus, it is my opinion that the Association does have the authority to borrow money.

Letter from Deputy Attorney General Calvin N. Rolfson to Gerald Iverson and Hugh McCutcheon (December 8, 1983).

In a June 15, 1984, letter to the Director of Institutions, then Deputy Attorney General Calvin N. Rolfson again addressed the issue whether a state agency had the authority to borrow money from the Bank of North Dakota. Relying on the authority of the State Penitentiary to "do all things necessary or incidental to the establishing and maintaining of such industries," N.D.C.C. § 12-48-03.1, it was concluded that the Director of Institutions and the warden of the State Penitentiary were authorized to apply for a loan from the Bank of North Dakota to maintain the industrial operations of Rough Rider Industries. Letter from Deputy Attorney General Calvin N. Rolfson to Alton Lick (June 15, 1984).

Based on the authority in N.D.C.C. § 54-52-04(1) granting the Board the "powers and privileges of a corporation," it is my opinion that the Public Employees Retirement System Board is authorized to borrow money to meet the cash flow problems of the Uniform Group Medical Insurance Program. Having concluded that the Public Employees Retirement System is authorized to borrow money, I will address whether the two specific funding sources set forth in your letter, the Bank of North Dakota and the Public Employees Retirement System Fund, are lawfully entitled to lend the necessary funds to the Board.

N.D.C.C. § 6-09-15(1)(a) states that the Bank of North Dakota may make loans to instrumentalities of the state. Although there is no definition as to what constitutes a state instrumentality, it is my opinion that this term is synonymous with state agencies or state institutions. The Public Employees Retirement System is a state agency as its existence is specifically created by state law. Thus, it is my opinion that the Bank of North Dakota may lawfully lend money to the Public Employees Retirement System Board for purposes of the cash flow needs of the Uniform Group Medical Insurance Program.

Whether the Board may borrow money from the Public Employees Retirement System Fund for the cash flow needs of the insurance program must be analyzed in accordance with the Board's statutory authority to invest moneys of the retirement system. N.D.C.C. § 54-52-04(6) states as follows:

The board shall select the funding agent or agents and establish an investment agreement contract. The contract must authorize the funding agent or agents to hold and invest moneys for the system. No moneys of the system may be invested by the board. The moneys of the system must be placed for investment only with a firm or firms whose primary endeavor is money management, and only after a trust agreement or contract has been executed. .

(Emphasis supplied.)

The foregoing statute prohibits the Board from directly investing the moneys of the retirement system. Inasmuch as a loan from the retirement system to the Uniform Group Medical Insurance Program would constitute an investment, it is my opinion that the Board is not authorized to engage in such a transaction.

Sincerely,

Nicholas J. Spaeth

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