

N.D.A.G. Letter to Engmann (Feb. 20, 1990)

February 20, 1990

Mr. Scott Engmann
Executive Director
North Dakota Retirement
and Investment Office
1930 Burnt Boat Drive
P.O. Box 7100
Bismarck, ND 58502

Dear Mr. Engmann:

Thank you for your December 13, 1989, letter requesting my opinion on whether the State Investment Board is authorized to expend fees received from agencies, institutions, and political subdivisions for the costs incurred by the Board in providing investment services to those entities. Specifically, you ask whether these costs are "investment costs" payable under the continuing statutory spending authority established in N.D.C.C. § 21-10-06.2 or whether they are "administrative expenses" payable under the North Dakota Retirement and Investment Office's (RIO) Appropriation Act, 1989 N.D. Sess. Laws ch. 54, § 1(1). I apologize for the delay in responding.

1989 N.D. Sess. Laws ch. 667, § 7 authorizes the State Investment Board to "provide investment services to, and manage the money of, any agency, institution, or political subdivision of the state. . . . The state investment board is authorized to charge a fee for providing investment services and any revenue collected must be deposited in the state retirement and investment fund."

The State Retirement and Investment Fund (Fund) was established by 1989 N.D. Sess. Laws ch. 667, § 1, which states in relevant part:

A special fund known as the "state retirement and investment fund" must be established for the purpose of defraying administrative expenses of the state retirement and investment office. The actual amount of administrative expenses incurred by the state retirement and investment office must be paid from the respective funds listed under section 21-10-06 and are hereby appropriated to the state retirement and investment fund in proportion to the services rendered for each fund as estimated by the administrative board. The amount necessary to pay all administrative expenses of the state retirement and investment office must be paid from the state retirement and investment fund in accordance with the agency's appropriation authority. Any interest income earned on the state retirement and investment fund must be credited to the fund.

As mentioned above, any fees received from agencies, institutions, and political subdivisions that contract to utilize the services of the State Investment Board must also be deposited in the Fund. 1989 N.D. Sess. Laws, ch. 667, § 7.

1989 N.D. Sess. Laws ch. 667, § 1, requires that administrative expenses be paid from the Fund in accordance with RIO's appropriation authority. See 1989 N.D. Sess. Laws ch. 54, § 1(1) (RIO's appropriation for administrative expenses; i.e., salary and wages, data processing, operating, and equipment). In addition to its 1989-91 appropriation authority, RIO is authorized to pay the amounts necessary for "investment costs" under 1989 N.D. Sess. Laws ch. 54, § 8, which states:

The amounts necessary to pay for investment costs, such as investment counseling fees, trustee fees, custodial fees, performance measurement fees, expenses associated with money manager searches, expenses associated with onsite audits and reviews of investment managers, and asset allocation expenses, incurred by the state investment board are hereby appropriated and must be paid directly out of the funds listed in section 21-10-06 by the fund incurring the expense.

The term "investment costs" is not statutorily defined.

You state in your letter that the rationale underlying the continuing statutory authority for payment of "investment costs" is that the agency cannot budget for these expenses. The expenses attributable to providing investment services to political subdivisions were not projected in RIO's budget (because RIO could estimate neither how many entities would utilize its services nor the fee structure eventually agreed upon) and, therefore, you suggest that these expenses should be considered "investment costs."

Whether a particular expense is an "investment cost," as contemplated by N.D.C.C. § 21-10-06.2, is a question of fact for the RIO Board. Therefore, I cannot provide you with a formal legal opinion on whether a particular expense qualifies as an "investment cost." However, I offer the following general discussion for your consideration in making this determination.

It is my observation that the term "investment costs," as used in N.D.C.C. § 21-10-06.2, generally would not include RIO's normal "administrative expenses" that should be paid pursuant to the agency's appropriation authority. The "investment costs" specifically enumerated in N.D.C.C. § 21-10-06.2 exemplify a type of expenditure that is distinguishable from normal "administrative expenses."

The fact that the Legislature enacted an appropriation act for RIO's administrative expenses indicates that the scope of "investment costs" does not include normal administrative expenses, yet it is evident that certain administrative expenses can also be categorized as "investment costs." For example, "expenses associated with money manager searches" and "expenses associated with onsite audits and reviews of investment managers" (two "investment costs" specifically enumerated in N.D.C.C.

§ 21-10-06.2), may include travel expenses of RIO employees, normally an administrative cost paid pursuant to RIO's appropriation authority.

The constitutional and statutory provisions governing the fiscal policies of the state are generally quite restrictive. See N.D. Const. art. X, § 12; N.D.C.C. ch. 54-44.1. This fact, in addition to the uncertain scope of "investment costs," compels me to recommend to the RIO Board that it should not rely on its continuing statutory spending authority to pay normal "administrative expenses" not specifically enumerated in N.D.C.C. § 21-10-06.2.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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