

N.D.A.G. Letter to Solberg (Dec. 20, 1991)

December 20, 1991

Mr. Wayne O. Solberg
Fargo City Attorney
PO Box 1897
Fargo, ND 58107-1897

Dear Mr. Solberg:

Thank you for your November 25, 1991, letter concerning whether the city of Fargo can purchase units of limited partnership in the Myron G. Nelson Fund for its Employee's Pension Fund in light of N.D.C.C. § 40-46-08.

N.D.C.C. § 40-46-08 establishes the investment guidelines for the board of trustees overseeing the municipal pension plan as follows:

At the end of each fiscal year, the board of trustees may invest any surplus left in the city employees' pension fund, but no part of the moneys realized from any tax levy shall be used for any purpose other than the payment of pensions. Such surplus funds may be invested in interest-bearing bonds of the United States or the state of North Dakota, or bonds or warrants of any county, township, or municipal corporation of this state which constitute the general obligations or contingent general obligations of the issuing tax authority, or investments with any federally insured bank or savings and loan association. All securities in which moneys belonging to the fund are invested shall be deposited with the treasurer of the board for safekeeping. The board may also invest all or part of such surplus funds in other investments by selecting a funding agent or agents and establish an investment agreement contract regarding such surplus funds. The contract shall authorize the funding agent or agents to hold and invest such funds for the board and such funds shall 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.

N.D.C.C. § 40-46-08 contemplates two investment alternatives. First, the board of trustees may self-invest within a defined legal list. Second, the investment of the plan's assets may be accomplished by funding agents selected by the board of trustees.

The board of trustees' self-investment activities are limited to investments in certain debt instruments that constitute general obligations of the issuing governmental entity or investments with any federally insured bank or saving and loan association. Aside from those investments specifically enumerated in N.D.C.C. § 40-46-08, the board of trustees is not otherwise authorized to directly invest the funds of the plans.

The second investment alternative available for the board of trustees is to retain an outside funding agent to invest the plan's funds. The investment choices of the outside funding agent is not limited to a legal list as are the investment choices of the board of trustees in regard to their self-investment activities. In the absence of a legal investment list, the outside funding agent is subject to the prudent person fiduciary standard. The prudent person rule for investment purposes is frequently stated as follows:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

29 U.S.C.S. § 1104 (West 1991). Thus, the board of trustees may diversify the investment portfolio by retaining outside funding agents who would not be limited to the legal investment list that governs the board in its self-investment activities. Not only does the prudent person rule apply to the activities of the funding agent, but the board of trustees is held to such a standard in its selection of outside funding agents. The board must exercise prudence in selecting funding agents to ensure that the funds' asset allocation goals are satisfied and that adequate diversification exists.

Under N.D.C.C. § 40-46-08, the funding agent must be a firm whose "primary endeavor is money management."

N.D.C.C. § 54-52-01(6) defines a funding agent as "an investment firm, trust bank, or other financial institution" This definition is equally applicable in interpreting N.D.C.C. § 40-46-08. See Larvon s. Baer, 418 N.W.2d 282 (N.D. 1988).

Whether a particular firm's primary endeavor is money management is a question of fact in which I cannot be of great assistance. Whether the Myron G. Nelson Fund's primary purpose is money management must be based upon a review of that fund's primary purpose. Determining that purpose requires reference not only to the stated statutory purpose found in N.D.C.C. ch. 10-30.2, but also the actual practices of the fund.

Sincerely,

Nicholas J. Spaeth

jfl

cc: Kermit Edward Bye