

N.D.A.G. Letter to Collins (Dec. 23, 1992)

December 23, 1992

Sparb Collins
Public Employees Retirement System
400 East Broadway, Suite 505
PO Box 1214
Bismarck, ND 58502-1214

Dear Mr. Collins:

Thank you for your December 1, 1992, letter concerning the impact on the Deferred Compensation Program under N.D.C.C. ch. 54-52.2, caused by the issuance of shares of stock to the state of North Dakota as a result of The Equitable Life Assurance Society of the United States demutualization.

Equitable Life converted from a mutual life insurance company to a stock insurance company and became a wholly owned subsidiary of The Equitable Companies Incorporated. The principal purpose of the demutualization plan was to enable Equitable Life to obtain equity capital through its holding company from sources which were unavailable to it as a mutual life insurance company. As a result of the demutualization plan, eligible policyholders were issued stock in proportion to their investment.

Stock was issued to the state of North Dakota because it is the present owner, under 26 U.S.C. § 457, of the assets of the deferred compensation program and a large portion of the program assets had been invested with Equitable Life. 26 U.S.C. § 457 requires that the state plan provide that all fund assets must "remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors."

The demutualization of Equitable Life provides the Public Employees Retirement Board with two options. The first option would be to sell the stock and credit participants' accounts in the program with the proceeds on an appropriate proportional basis. Participants who have invested all or a portion of their contributions with Equitable Life would receive a proportional allocation which would be subject to investment as specified by the participant. The Board's second option would be to keep the stock and allocate it to each participant's account in the program on a similar basis. Under this option, the Board would have to establish some account or vehicle to hold the stock on behalf of the participants until such time as the stock is needed to be distributed in the form of benefits.

In connection with these two options, you ask the following questions:

1. Does the Board have the authority to sell the Equitable stock and allocate the

proceeds to the eligible participants?

2. If the answer to Question 1 is "yes", are there any conditions or limitations to this authority? For example, must the Board exercise the sale within any limited time frame or use any special procedure in executing the sale?
3. Can the Board elect to keep the stock and not sell it as outlined in the second option noted? If so, are there any conditions or limitations to this authority?
4. If the answer to question 3 is otherwise "yes", does the Board have the authority to create a separate account or fund to hold these assets in the name of the state but for the benefit of the participants in the program?

Turning to your first question, you ask whether the Board has the authority to sell Equitable Life stock and allocate the proceeds to the participants who have invested all or a portion of their contributions with Equitable Life.

N.D.C.C. ch. 54-52.2 created a Deferred Compensation Plan for state and political subdivision employees. N.D.C.C. § 54-52.2-03 places the administration of the deferred compensation program under the direction of the Board and directs it to administer the program in compliance with appropriate provisions of the Internal Revenue Code. In this fashion, the Board acts as an administrative fiduciary of the program. However, investment fiduciary responsibilities are set under N.D.C.C. § 54-52.2-01 between the participant and the participant's chosen deferred compensation provider as specified by the agreement with the provider.

It is well-settled that public officials have that authority which is expressly given them by the constitution and statutes, together with those powers and duties which are necessarily implied from the express grant of authority. American Federation of State, County, and Municipal Employees, Council No. 95 v. Olson, 338 N.W.2d 97, 100 (N.D. 1983). The Minnesota Supreme Court examined the issue of incidental and implied powers of public officers in State v. Hanson, 78 N.W.2d 679, 686 (Minn. 1956). The court stated:

It is generally considered that where a public officer such as a labor conciliator is granted powers to determine and certify representatives for collective bargaining, he has a wide discretion in carrying out those powers. 43 Am. Jur., Public Officers, § 255. It is also well established that in exercising judgment and discretion such conciliator is not wholly confined to powers specifically conferred by statute. The duties of such public officer include all those which fairly lie within its scope, those which are essential to the accomplishment of the main purposes for which the office was created, and those which, although incidental and collateral, are germane to, or serve to promote or benefit the accomplishment of the principal purposes. However, these implications are not to be extended beyond the fair inferences to be gathered from the circumstances of each case.

Because the Board is the administrative fiduciary of the program and the stock is issued to the state of North Dakota as present owner of all deferred compensation program assets, it is my opinion that the Board has implicit authority to sell the stock and allocate the proceeds on a proportional basis to the accounts of those concerned participants. This is especially true in light of the fact that the demutualization of Equitable Life was a matter over which the Board did not have control and which causes it to act in some manner. In this fashion, the Board acts as a mere conduit under Equitable Life's demutualization plan in selling the stock and allocating the proceeds to the concerned participants' accounts. Equitable Life would have made a direct stock allocation to the concerned participants if such an allocation would have been permitted by the Internal Revenue Service.

Turning to your second question, you ask whether there are any conditions or limitations as to the Board's authority to sell the stock and allocate the proceeds to the concerned participants' accounts. The demutualization of a deferred compensation provider was not contemplated under N.D.C.C. ch. 54-52.2 and, accordingly, there are no specific legislative guidelines which must be met. However, it seems logical to conclude that the sale must be done in a commercially reasonable manner and that the proceeds be allocated fairly to the concerned participants' accounts. See generally State v. Hartman, 194 N.W.2d 653, 656 (Wis. 1972). ("A fiduciary has the duty to sell the assets of an estate for the best price that can reasonably be obtained.") In conducting the sale, the Board should sell the stock within a reasonable time. See Brink v. Curless, 209 N.W.2d 758, 769 (N.D. 1973) ("[W]here the statute is silent with respect to the time within which an official act must be performed, the law contemplates that such duty must be performed within a reasonable time.") Additionally, it is important to note that under 12 C.F.R. § 9.10 "[f]unds held by a national bank in a fiduciary capacity which are awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account." Although the Board is not bound by 12 C.F.R. § 9.10, it provides some guidance nonetheless.

Your third question asks whether the Board may elect to keep the stock as outlined in the Board's second option. In exercising this option, the Board places itself in the role of an investment fiduciary rather than as an administrative fiduciary of the program. The exercise of such an integral investment function cannot be said to be fairly inferred from the Board's expressed statutory function as program administrator. Thus, it is my opinion that the Board does not have implicit statutory authority as program administrator to keep the stock without participant authorization. Because of this answer, it is not necessary to address your fourth question. Although I believe the Board has the authority to sell the stock and allocate the proceeds, the Board must also ensure for itself that this transaction is consistent with the provisions of the Internal Revenue Code and appropriate regulations.

I trust this addresses your concerns.

Sincerely,

Nicholas J. Spaeth

dec/jfl