

**OPINION
67-220**

January 4, 1967 (OPINION)

General James O. Guthrie

Chairman

State Employees' Retirement Board

RE: State - Employees' Retirement System - Investment of Funds

This is in response to your letter in which you recite a brief summary of the transactions of the State Employees' Retirement Plan and then ask for an opinion on the following questions:

1. May State Employee Retirement Funds be invested in corporate (common) stock?
2. Is an investment management contract with the Retirement Board prohibited by the North Dakota Securities Act (Chapter 10-04 N.D.C.C.)?
3. Is it legally material whether the investment management function be performed pursuant to a separate agreement or is provided for in a trust agreement, insurance contract or other contract which might include holding funds, managing the investment thereof and paying benefits?"

As to question number 1, the North Dakota Supreme Court in *Northwestern Bell Telephone Company v. Wentz*, 103 N.W.2d. 245, observed that under the provisions of Section 185 of the North Dakota Constitution it is conceivable and permissible for the state of North Dakota in connection with the operation of an industry or enterprise or business, which is permitted by law, to loan or give its credit or make donations to or aid any individual association or corporation, and also to subscribe to or become the owner of capital stock in any association or corporation, but not otherwise. From this a strong inference can be observed that it is the state per se which is prohibited from loaning its credit or making donations to private individuals, associations or corporations, and is also prohibited from becoming the owner of capital stock. As to the State Employees' Retirement Fund, the state is engaged in the investing business for its employees which is a lawful business or enterprise. It is therefore our opinion that the State Employees' Retirement Funds may be invested in capital stock.

As to question number 2, neither Chapter 54-52 nor Chapter 10-04 of the North Dakota Century Code creates any exemption pertaining to transactions of the State Employees' Retirement Program from the Securities Act. In the absence of such exemption we must conclude, and it is our opinion, that the State Employees Retirement Program is not exempt from the Securities Act and is required to comply with its provisions whenever it engages in the transactions covered by the Securities Act.

In reaching this conclusion we are not implying that the Retirement Program is engaged in the securities business per se. It stands in a comparable position as that of an investor. This means that those persons with whom the State Retirement Board deals and transacts business with must comply with the Securities Act. It does not appear from Chapter 54-52 that the Retirement Program or its officers are engaged in the business of issuing securities or selling securities, etc. Any transaction, if done through licensed dealers, brokers or agents, would satisfy the provisions of the Securities Act.

Thus in direct response to your second question, the entering into an investment contract per se is not prohibited by Chapter 10-05. This, however, does not mean that the person with whom the contract is entered into need not comply with the Securities Act.

As to question number 3, under subsection 6 of section 54-52-04 of the North Dakota Century Code, it is provided that "The board shall select the funding agent or agents and establish an investment agreement contract. The contract shall authorize the funding agent or agents to hold and invest moneys for the system and pay benefits thereunder. No moneys of the system shall be invested by the board.
* * *."

One specific prohibition is observed that the board may not invest the funds of the Retirement Program. This prohibition would prevail whether the board attempted to do it directly or indirectly. The term "fund agent" or "agents" is defined in section 54-52-01 by subsection 4 thereof, and provides as follows:

4. 'Funding agent' or 'agents' shall mean the insurance company, trust bank or other financial institution whom the retirement board selects to hold and invest the employers and members contributions and pay certain benefits;
* * * ." (Underscoring ours.)

Under subsection 6, the board is authorized to select a funding agent or agents, however, as the term "funding agent" or "agents" is defined it would appear that the agent is to perform all of the functions enumerated in the definition as found in subsection 4 of section 54-52-01. By using the terms "agent" or "agents" we presume that the Legislature intended that the Retirement Board could employ jointly one or more agents, which would perform the functions of a funding agent or agents as defined. We do not believe that the Legislature intended for the Retirement Board to provide separate agreements or agents for each specific function. We presume that the Legislature intended to keep the program as uncomplicated as possible and yet permit the investment of the funds to bring about the best return possible. This provision, however, is not free from doubt and if other thoughts are intended by the Retirement Board, it is recommended that they secure legislation to clarify these provisions or modify same to permit different conclusions.

The conclusions reached herein are predicated on the language found in the Act, which strongly suggests that the Legislature intended the funding agent to perform all of the functions stated, and that the Retirement Board refrain from entering into separate agreements with

separate agents, each performing a separate function. The authority under section 54-52-13 of the North Dakota Century Code to disburse funds in accordance to plan adopted apparently refers to board disbursing funds to the funding agent.

It also seems reasonable that any agent who is to invest the moneys to produce the maximum returns must at all times be fully informed of the demands being made on the funds so that intelligent investments can be made to bring about the maximum returns.

The language of the Act pertaining to the activities of the board could stand clarification by the Legislature.

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