

Opinion No. 57-279

October 29, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,
Assistant Attorney General

TO: Hon. Horace DeVargas, State Senator, Rio Arriba County, P. O. Box 565,
Española, New Mexico

QUESTION

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May the State Treasurer, as custodian of the "educational retirement fund" pursuant to Ch. 197, Laws of 1957 (§ 73-12-34 et. seq., N.M.S.A. 1953, 1957 p.s.), invest moneys of the fund, pursuant to § 16 of Ch. 197 (§ 73-12-49, N.M.S.A., 1953, 1957 p.s.) in shares of mutual funds or investment trusts?

CONCLUSION

No.

OPINION

ANALYSIS

Ch. 197 of the Laws of 1957, the Educational Retirement Act, in § 11 (§ 73-12-44) transfers all assets of the previously existing teacher retirement fund into the educational retirement fund, as it is designated in the statute, and in § 14 (§ 73-12-47) names the state treasurer the custodian of the fund. With respect to investment of fund moneys, § 16 (§ 73-12-49) provides as follows:

"The state treasurer shall invest fund moneys in the same manner as other trust funds of the state are authorized to be invested or in securities in which the funds or private trust companies established under the laws of New Mexico may be lawfully invested."

As you know, the authority of the state treasurer with respect to the investment of permanent trust funds of the state is limited by the Constitution of New Mexico, particularly Art. VIII, Sec. 4 and Art. XII, Sec. 7, and also by the Enabling Act for New Mexico (Act of June 20, 1910, 36 Stat. at Large 557, ch. 310), particularly Section 10 thereof, to investment in "interest-bearing securities", under any circumstances.

The term "securities", as used in the Constitution and the Enabling Act, is used in its technical sense, in which it applies to obligations such as a mortgage or pledge, given by a debtor ". . . in order to make sure the payment or performance of his debt, by

furnishing the creditor with a resource to be used in case of failure in the principal obligation (Black's Law Dictionary, 3d ed., West, 1933. p. 1595, "Security")." In this technical sense, the term refers to interest-bearing obligations which are more than mere naked promises of liability by the debtor. See also 79 C.J.S., Security; Securities, p. 943.

As we understand your inquiry, the shares of mutual funds or investment trusts are shares evidencing an equitable interest or ownership of the assets of the investment company, the primary business of which is the investment of the funds contributed by its shareholders in common stocks, preferred stocks and bonds (or one or more of these) of American business corporations.

Since such shares evidence equitable ownership, rather than any secured obligation, it is clear, in the opinion of this office, that they do not come within any definition of "interest-bearing securities."

The governing statutory provision also permits the investment of fund moneys in securities in which the funds of private trust companies established under the laws of this state may be invested. We note that the term "securities" is also used in this part of the statute. To determine the scope of this authorization, it is necessary to consider the authority conferred upon such trust companies by statute. The applicable statute appears to be Laws of 1915, Ch. 67, Sections 58 through 66, as amended (§§ 48-5-1 through 48-5-8, N.M.S.A., 1953, 1957 p.s.). § 48-5-3, setting forth the purposes for which trust companies may be created, provides in relevant part as follows:

"Seventh. To loan money upon real estate, personal and collateral security and to purchase, invest in and sell all kinds of government, state, municipal and other bonds and all kinds of negotiable and non-negotiable paper, and other investment securities."

So far as this provision relates to investments, it enumerates several specific classes of investment, all of which clearly consist of written instruments constituting evidences of debt. The question then arises whether the general term added, "other investment securities", serves to broaden the otherwise narrow scope of the provision to include shares of mutual funds, or even common or preferred stocks.

In our opinion, it does not. First, the term "securities", as previously indicated, again appears to be used in its technical sense. Second, under well-settled rules of statutory construction, when general words are used, following the enumeration of specific classes of things, the general words are to be construed as applicable only to things of the same general nature as those enumerated. See 82 C.J.S., Statutes, Sec. 332 (b), p. 658.

It follows, then, that the governing statutes quoted do not authorize the state treasurer to invest moneys of the educational retirement fund in the shares of mutual funds of investment trusts. In reaching this conclusion, this office is aware that the term "securities" is now frequently used in a broad, generic sense which would include stocks

and other evidences of equity ownership. See 79 C.J.S., Security; Securities, p. 947. And a trust company or other trustee, with respect to the investment of trust funds of individuals, has extremely broad investment powers, subject to the "prudent man" rule, under the laws of this state. See § 33-1-16, N.M.S.A., 1953, prescribing the investment authority of trustees, which specifically includes authority to invest in "securities of any open-end or close -end management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended . . .". We deem it significant, however, that the legislature, in prescribing the investment authority of the state treasurer with respect to the educational retirement fund, refrained from referring to this statute, and instead referred to the statute which provides more limited authority for trust companies as to the investment of their own funds. In this connection, it may be of interest that Senate Joint Resolution No. 12, adopted by the Legislature in 1957, proposes a constitutional amendment which, if adopted, will broaden the scope of the investment authority with respect to permanent funds of the state generally.

For all the foregoing reasons, it is the opinion of this office that the state treasurer cannot invest moneys of the educational retirement fund in shares of mutual funds or investment trusts.