

## **Opinion No. 58-120**

June 10, 1958

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

**TO:** Edward M. Hartman, Director, Department of Finance and Administration, Capitol  
Building, Santa Fe, New Mexico

### **QUESTION**

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1. Do the limitations on investment of permanent funds imposed by the Constitution and the Enabling Act apply also to the investment of Educational Retirement Fund moneys, pursuant to Section 16 of Chapter 197, Laws of 1957?
2. Assuming a negative answer to Question 1, what limitations are imposed on such investments of the Educational Retirement Fund?
3. Can investments from Educational Retirement Fund moneys be made in all types of debt securities as opposed to equity securities, as discussed in Opinion of the Attorney General 57-279, dated October 29, 1957?
4. Does the authority given to the State Treasurer by Section 16 of Chapter 197, Laws of 1957, extend to the investment in corporate bonds, real estate mortgages, and municipal bonds of the revenue of special assessment type?

#### **CONCLUSIONS**

1. No, except in the alternative.
2. In the alternative, the limitations stated as to securities in § 48-5-3 (Seventh) N.M.S.A., 1953.
3. Yes; see analysis.
4. Yes; see analysis.

### **OPINION**

#### **ANALYSIS**

In Opinion 57-279 of this office, referred to in this opinion request, it was specifically held that the State Treasurer, as custodian of the Educational Retirement Fund created

by Ch. 197, Laws of 1957, may not invest moneys of the fund, pursuant to § 16 of said Ch. 197, in shares of mutual funds or investment trusts. The basis of this conclusion was that the authorization of said § 16, incorporating by reference constitutional and statutory provisions set out in that opinion, restricted investments of the Fund moneys to securities in the technical sense of the term, that is, interest-bearing obligations which are more than a mere naked promise of liability by the debtor, but furnish the creditor with a resource to be used in case of failure of the principal obligation. See Opinion 57-279 and authorities cited.

The present inquiry seeks to explore and define with some precision the boundaries of the area of permissible investment as expressed in the earlier opinion cited. For convenience, we quote again the statutory provision construed, § 16 of Ch. 197, Laws of 1957 (§ 73-12-49):

"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 of private trust companies established under the laws of New Mexico may be lawfully invested."

The answer to each of the several questions now put involves merely the application of the criteria referred to in the earlier opinion. To avoid possibility of ambiguity, the following is stated.

The statutory provision considered obviously permits investment of moneys of the Education Retirement Fund in investments permitted for "other trust funds of the state" - as an alternative, not an exclusive, authorization.

§ 10 of the Enabling Act (36 Stats.-at-Large 557. ch. 310) provides for the investment of land-grant trust funds in "safe interest-bearing securities" as therein provided. Article XII, § 7 of the Constitution specifically relates to one of these trust funds, the permanent school fund, and provides for its investments in bonds of the State or designated subdivisions thereof. This provision also contemplates the expansion of the scope of investments so authorized, upon authorization by three-fourths vote of the entire membership of each House of the Legislature, and such authorization, also is limited to "interest-bearing securities." Certain additional securities have been so authorized by the legislature for investment of the permanent school fund. The authorization of Article XII, Section 7, with its implementing legislation, is far more limited than the field of securities referred to in Section 48-5-3 (Seventh), however. Hence our answer to your first question. Investments of the type described in Question 1 are authorized, in other words, but investments of a broader range are authorized also, in view of the incorporation of § 48-5-3 (Seventh) by reference in § 16 of Ch. 197, Laws of 1957.

As previously indicated in Opinion 57-279 - and this answers the second question submitted - § 16 of Ch. 197, Laws of 1957, clearly contemplates that the treasurer may invest fund moneys also in "securities in which the funds of private trust companies established under the laws of New Mexico may be lawfully invested." To identify the

securities permitted, reference is made to § 48-5-3, stating the purposes for which trust companies may be created, and providing in relevant part:

"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."

It is noted that the investment power of a private trust company with respect to its own funds appears to contemplate the loan of funds on unsecured obligations, while the Treasurer's authority as to the educational Retirement Fund is limited to securities in which investment is permitted by the provision above-quoted. However, the authorization, in the view of this office, does extend to the investment of moneys of the Fund in any type of debt security. The question then becomes one of fact - is the particular obligation in which investment is proposed a security? This question can only be answered on a case-by-case, basis and it is neither necessary or proper to undertake to answer it here. It should be pointed out that a conclusion on this question is reached by applying the definition of security, above indicated, to the particular obligation to determine whether or not it has the characteristics of a security. For example, it might be questionable whether or not corporate debentures were securities, depending on whether or not they constitute substantially more than a naked promise to pay from a particular source, e.g., corporate income. The foregoing is sufficient to suggest the impracticability of prescribing a rule to be applied mechanically in all cases. If the proposed investment is a true security in the technical sense of the term, the investment will be proper. Investment in all types of debt securities, in that sense, is proper, as suggested by your third question.

In the fourth question, you ask whether investment of the Fund in corporate bonds, real estate mortgages, and municipal revenue or special assessment bonds is proper.

In our opinion, the quoted statutory provisions permit investment of the Fund moneys in corporate bonds, so long as such bonds are in fact securities. It might be argued that the authority to invest in "all kinds of government, state, municipal and other bonds" is limited by the rule of **ejusdem generis** to the bonds of other public authorities. See 82 C.J.S., Statutes, Sec. 332 (b), p. 658. Any doubt on this score is removed by the phrase "other investment securities". In Opinion 57-279, we held that this language did not broaden the scope of the earlier specific language to include equities. We now hold that this language, together with the other phrase just above quoted, authorizes investment in corporate bonds as well as the bonds of public authorities, provided that such bonds are securities in the technical sense.

Investment in real estate mortgages clearly is authorized by the governing provisions. Only a question of policy, not one of law, might be raised on this point.

In our view, investment in municipal revenue bonds is proper. Legislation authorizing issuance of such bonds, e.g., for public utility purposes, generally provides for the irrevocable pledge of the income of the utility (e.g., § 14-39-8), although such bonds are

not general obligations of the municipality (see § 14-39-11. In addition, the law imposes an obligation to maintain rates sufficient to cover expense of operation and also debt service requirements; and this obligation may be enforced by mandamus brought by any bond holder (§ 14-39-12). Furthermore, statute requires application of the net revenues of any such utility operation (a) to maintenance, improvement, extension and expenses of operation; (b) to payment of interest on revenue bonds issued; and (c) to creation of a sinking fund for retirement of bonds issued, until 125% of annual debt service requirements have been met (§ 14-39-26, as amended Laws 1955 ch. 101 § 1). On failure by a municipality to observe the foregoing requirements, a receiver may be appointed (§ 14-39-29). Such provisions appear to afford the bondholder substantial recourse in event of the failure of the principal obligation, are more than a mere naked promise to pay, and therefore are permissible investments.

Municipal special assessment bonds are also proper investments under the governing statutory provisions, even more clearly than revenue bonds. Under § 14-41-3, the amount assessed against any property to pay the costs of any improvement becomes a lien on the property, subject to foreclosure by the municipality, or directly by the bondholders. Municipalities are required to act as trustees for the benefit of the holders of special assessment street improvements (§ 14-41-4). Proceeds of the municipal gasoline tax may be placed in a special street improvement fund (§ 14-46-7), and irrevocably pledged to the payment of special assessment street improvement bonds. Again, such provisions, when applicable, appear to afford recourse in event of the failure of the principal obligation, and to render the bonds more than mere naked promises to pay, and so securities in the technical sense of the term, and permissible investments under the statute considered

The foregoing discussion of your fourth question does not attempt to evaluate all of the statutes which might bear upon any particular municipal revenue or special assessment bond issue. Each obligation of this type, and of any other type, should be evaluated with full consideration of its individual characteristics, to determine that the State Treasurer, as creditor, will have more than a mere promise to pay, and will have substantial recourse in event of failure of the principal obligation, before investing.