

Opinion No. 60-220

December 8, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Fred W. Phelps Director New Mexico Department of Development P.O. Box 1716 Santa Fe, New Mexico

QUESTION

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Can the Educational Retirement Board invest monies of the Educational Retirement Fund in first mortgage industrial revenue bonds issued by a municipality and further secured by a full term lease signed by the industry desiring to locate in the municipality?

CONCLUSION

No.

OPINION

{*641} ANALYSIS

Investments of the Educational Retirement Fund are governed by § 73-12-49.1 (P.S.), N.M.S.A., 1953 Compilation. A comparison of this section with § 11-2-8.12, N.M.S.A., 1953 Compilation (P.S.), reveals that the types of securities in which the Educational Retirement Fund can be invested are identical with the types of securities in which the State Permanent Fund can be invested. In Opinion of the Attorney General No. 60-204, October 27, 1960, we ruled that the State Permanent Fund could not be invested in municipal industrial revenue bonds. It was there pointed out that industrial revenue bonds were not municipal bonds, because they are not the obligation of a municipality; they are not utility bonds, for industrial revenue bonds may not be issued to acquire a "project" in the nature of a public utility; and they are not corporate bonds because they do not represent the obligation of a corporation. We think that the reasoning of Opinion No. 60-204 applies with equal force to investment of the Educational Retirement Fund.

The fact that the bonds in question will be secured by a first mortgage on the "project" does not change this reasoning. Such a mortgage merely binds the assets subject to the mortgage. It still does not represent the obligation of a municipality, nor does it pledge the credit of any corporation, even the corporation operating the "project". While this additional security should make the bonds more marketable, it does not convert them into municipal bonds of the type that the Educational Retirement Board may purchase, nor does it convert them into corporate bonds. Industrial revenue bonds

secured by a mortgage on the "project" still occupy a middle ground between municipal bonds and corporate bonds.

Neither is the reasoning of Opinion No. 60-204 changed by the fact that the bonds in question will be further secured by a full term lease signed by the industry desiring to locate within the municipality. Agreeing to a lease for a term certain in years, and pledging the payments under the lease to the payment of the bonds cannot convert the bonds into municipal or corporate obligations. Again, neither the general credit nor the taxing power of the municipality is pledged, nor is the credit of a corporation pledged.

We are, therefore, of opinion that the Educational Retirement Board cannot invest funds of the Educational Retirement Fund in first mortgage industrial revenue bonds secured by full term lease signed by the industry desiring to locate in the municipality.

By: Norman S. Thayer

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