Opinion No. 71-10

January 28, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Jesse D. Kornegay, State Treasurer Land Office Building Santa Fe, New Mexico 87501 Senator Odis Echols, Jr. State Senator Executive Legislative Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTION

May the State Investment Officer, under the supervision of the State Investment Council, invest not more than twenty percent of the permanent funds in interest-bearing time deposits at rates not lower than rates received by the State Treasurer on deposits of public money, assuming they are properly secured as provided by law, in New Mexico banks and savings and loan associations?

CONCLUSION

Yes, but see analysis.

OPINION

*{*12}* **ANALYSIS**

Your question requires an analysis of Chapter 2, Laws 1970. When making investments of the state permanent funds, the State Investment Officer and the State Investment Council, are bound to the standard of the prudent *{*13}* man rule of investments. See Section 11-2-8. 13, N.M.S.A., 1953 compilation, which provides:

"Investments made pursuant to this act shall be made with the exercise of that degree of judgment and care, under circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not for speculation, but for investment, considering the probable safety of their capital as well as the probable income to be derived."

This statutory language is very similar to the constitutional standard of prudence. New Mexico Constitution, Article XII, Section 7. These standards are consistent with the intent of congress that the funds provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trusts. **Lassen v Arizona,** 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). These standards are also consistent with the intent of the New Mexico Legislature. Chapter 2, Laws 1970.

The act in question would, however, prohibit the deposit of more than five percent of the available funds from being deposited in any single savings and loan association or bank.

Section 2 (B) of the act is unconstitutional, but severable. Where the New Mexico Constitution has said that the State Investment Officer acting with the State Investment Council has the power and is charged with the duty to invest the state permanent funds, (New Mexico Constitution, Article XII, Section 7), the constitution is the controlling and fundamental law as to that matter. **In re atchison, T. & S.F. Ry.,** 37 N.M. 194, 20 P.2d 918 (1933). The legislature must proceed in accordance with the terms of the constitution, and no act of the legislature can enlarge or abridge the power to invest the state permanent funds or place the power elsewhere than in the State Investment Officer and the State Investment Council. **In re Atchison, T. & S.F. Ry., supra.**

It follows, therefore, that Section 2 (B), insofar as it purports to provide that officers who are not the State Investment Officer or the State Investment Council must make the final determination on the investment of the state permanent funds in interest-bearing time deposits, offends the constitutional grant to the State Investment Officer and the State Investment Council of the power to invest the permanent funds. To the extent that this provision is inconsistent with the constitution, the provisions are declared to be unconstitutional.

Nonetheless, it is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another, and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. **State v. Brooken,,** 19 N.M. 404, 143 P. 479. Indeed, it has been said that whenever a statute contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of a court so to declare and to maintain the act insofar as it is valid. **El Paso & N.E.R. Co., v. Gutierrez,** 215 U.S. 87, 54 L. ed. 106, 30 S. Ct. 21.

The question whether the rule of severability shall be applied to save partially unconstitutional legislation from being struck down in toto, involves, fundamentally, a determination of and conformity with intent of the legislative body which enacted the legislation. However, in determining what was the intention of the legislature, certain tests of severability have been developed. Thus, it has been held that if, after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void; and effect may be given to the remaining portions. **Stillman v. Lynch,** 56 Utah 540, 192 P. 272, 12 ALR. 552. It is also held that in any case where it is sought to apply the general rule, the constitutional and unconstitutional parts should be so severable that the valid portion may be read and may stand by itself. **Fite v State,** 114 Tenn. 646, 88 SW 941.

In Chapter 2, Laws 1970, when Section 2 (B) is stricken down as unconstitutional, the constitutional *{*14}* officers (the State Investment Officer acting with the State

Investment Council) remain with the power to invest the state permanent funds, and therefore, the remainder of the act can stand and be operative.

It must be kept in mind that Chapter 2, Laws 1970, is permissive legislation only and imposes no mandatory duties on the constitutional officers.

This opinion shall supersede Attorney General Opinion No. 70-94 to the extent it is in conflict therewith. Otherwise, it shall serve to reinforce it.

I trust that you will advise Mr. Robert G. Mead, State Investment Officer, as well as the State Investment Council, of my decision in this regard.