Opinion No. 75-17

February 27, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Vincent J. Montoya Chairman State Investment Council P. O. Box 966 Santa Fe, New Mexico 87503

QUESTIONS

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Is Senate Bill 169 constitutional?

CONCLUSION

No.

OPINION

*{*59}* **ANALYSIS**

Senate Bill 169, as amended and recently passed by the New Mexico Senate would amend Section *{*60}* 11-2-10.2, NMSA, 1953 Comp. That section presently reads as follows:

"11-2-10.2. PERMANENT FUNDS -- INVESTMENT IN INTEREST-BEARING TIME DEPOSITS. -- The state investment officer, under the supervision of the state investment council, **though not required to, may invest not more than twenty per cent** [20%] of the permanent school fund and other permanent funds in interest-bearing time deposits **at rates not lower than rates received by the state treasurer on deposits of public money.** Deposits shall be secured as provided by law for securing deposits of public funds. **When determined to be in the best interest of the beneficiaries of the fund,** deposits shall be made in banks or savings and loan associations that are:

A. located in New Mexico;

B. approved by the state investment officer in accordance with policy regulations promulgated by the state investment council; and

C. provided that not more than five per cent [5%] of the permanent funds available for deposit under this section shall be deposited in any single savings and loan association or bank." (Emphasis supplied.)

If Senate Bill 169, as amended, is passed into law, that section would read in part as follows:

"The state investment officer, under the supervision of the state investment council, **shall invest at least ten percent of the permanent school fund** and other permanent funds in interest-bearing time deposits within a reasonable length of time at rates not lower than the United States treasury bill rate on the day the investment is made. No part of the permanent fund invested in common stock shall be sold at a loss solely to comply with the provisions of this section. Deposits shall be secured as provided by law for securing deposits of public funds. **Deposits shall be made** in banks qualified to receive deposits of public funds or insured savings and loan associations that are: . . . (same as presently written." (Emphasis supplied.)

A new and final paragraph of the amended section would require that the qualifying financial institutions receive an equitable apportionment of the investment and would provide for distribution of the investment if an order of deposit is rejected by an institution.

Although Section 11-2-10.2, **supra,** relates in either instance to other permanent funds in addition to the permanent **school** fund, we will confine our analysis to that latter fund. In examining the present and proposed Section 11-2-10.2, **supra,** the most obvious change is that a minimum percentage of the fund **is required** to be invested in interest-bearing time deposits.

The constitutionality of this requirement must be scrutinized in the light of Article XII, Section 7 of the New Mexico Constitution, which provides in relevant part:

"The principal of the permanent school fund, and other permanent funds, **shall be invested by** a state investment officer in accordance with policy regulations promulgated by a state investment council. The legislature may by a three-fourth's *{*61}* vote of the members elected to each house provide that said funds **may be invested** in interest-bearing or other securities. All losses from such interest-bearing notes or securities which have definite maturity dates shall be reimbursed by the state." (Emphasis supplied.)

This provision constitutes a limit on the Legislature's power to interfere with the discretion vested in the State Investment Council and the State Investment Officer. See, **State ex rel. Hovey Concrete Products Co. v. Mechem,** 63 N.M. 250, 316 P.2d 1069 (1957), where it was said that:

". . . deeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate."

Senate Bill 169 is unconstitutional because it purports to exercise a power over the investment of permanent funds which Article XII, Section 7 does not grant to the Legislature. The bill provides that permanent funds **must** be invested in interest-bearing time deposits; however, Article XII, Section 7 states that the Legislature may provide only that "said funds **may** be invested in interest-bearing or other securities."

The New Mexico Supreme Court has previously rejected a similar legislative attempt. In **State v. Marron,** 18 N.M. 426, 137 P. 845 (1913), the Court examined language in an earlier version of Article XII, Section 7 with respect to a joint legislative resolution. The resolution, which passed by the required vote and which the court found to have the effect of law, required a specific investment of the funds.

Article XII, Section 7 of the Constitution then read in pertinent part:

". . . **The legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities.** All bonds or other securities in which any portion of the school fund shall be invested **must be first approved** by the governor, attorney general and secretary of state . . . ." (Emphasis supplied)

This section **now** provides that the State Investment Officer, rather than those other state officers, is the investment authority. The limit on the legislative power over permanent funds is identical in both this and the present version of the section.

The Supreme Court in the **Marron** case held that the joint resolution was unconstitutional and reasoned as follows:

"The legislature, in said joint resolution . . . , has attempted to control the discretion of the Governor, Secretary of State and Attorney General in the exercise of the supervisory control over the investment of these funds. The (joint resolution) **is mandatory in terms and requires them, absolutely, to deposit the funds in banks. In this the legislature has evidently exceeded its constitutional power.** The Constitution has conferred upon (these state officers) the power to approve or disapprove any proposed investment of these funds. Their discretion is in no way limited, but is absolute. It *{*62}* is not confined to the question as to whether the investment is safe or not. If for any reason, lack of safety, length or shortness of time for which the loan can be obtained, rate of interest obtainable, or any other consideration of public policy, any given investment of these funds is deemed inadvisable, (these state officers) clearly have the power to withhold their approval, and **we know of no authority, neither legislative nor judicial, to control the discretion. The grant of legislative power in (Article XII, Section 7) of the Constitution is not a grant of power to direct the investment in any particular form of security. The selection of the investment is not a legislative function under the provisions of the Constitution.**

"We, therefore, hold that said joint resolution, **insofar as it requires the deposit** of these funds in banks, **is beyond the** legislative power and void." 18 N.M. at 439-440. (Emphasis supplied.)

Based upon the Court's decision, we conclude that Senate Bill 169, as amended, is unconstitutional insofar as it **requires** an investment of a portion of the permanent school fund in interest-bearing time deposits and insofar as it deprives the Investment Officer and Investment Council of the investment discretion vested in them by Article XII, Section 7.

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