

## Opinion No. 44-4556

August 4, 1944

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Guy Shepard, State Treasurer, Santa Fe, New Mexico

We have your letter of July 18, 1944 wherein you request an official opinion of this office concerning the following questions:

(1) Does the State Treasurer, acting by and with the consent of the State Board of Finance, have the right to sell any bonds or debentures now held in the permanent funds provided they are not sold at less than their par value?

(2) Does the State Treasurer, by and with the consent of the State Board of Finance, have the right to exchange bonds or debentures now held in the permanent funds for United States Government securities provided the par amount of such securities is equal to or larger than the par value of the bonds or debentures so exchanged?

(3) If the bonds or debentures can be legally sold or exchanged, do they have to be advertised or can the State Treasurer, acting by and with the consent of the Board of Finance, sell them at either public or private sale?

According to information which you have given this office, it is my understanding that you have in mind a certain proposition made to you by a group of bond companies wherein it is contemplated that the State of New Mexico will exchange about \$ 7,000,000.00 face value highway debentures for United States bonds of the face value of approximately one-half million dollars more than the highway debentures, which will also net the State of New Mexico approximately \$ 85,000.00 a year more interest than is now received on the highway debenture bonds.

It would, therefore, appear from the facts that you have outlined to us that the various permanent funds which now own the highway debentures would be materially increased by the exchange or sale which you contemplate in the sum of over \$ 2,000,000.00 over a period of twenty years, considering both increased principal and increased interest received during this period which is the approximate interval until the date of maturity of said government bonds.

We have carefully examined the Enabling Act, the Constitution of the State of New Mexico and the statutes of the State of New Mexico pertaining to this matter. We have also attempted to find cases which have been decided in other states under similar constitutional or statutory provisions. Our search would indicate that none of the above questions have ever been passed upon by the Supreme Court of this State and have only once been passed upon by a district court of this State. We further find that the Attorney General's office has only been called to pass upon a similar question once

before. In view of the importance of this matter, we will set out in detail what we consider the material provisions which must be construed in determining the above questions.

Section 10 of the Enabling Act provided in part as follows:

"\* \* \* The State Treasurer shall keep all such monies invested in safe-interest-bearing securities, which securities shall be approved by the Governor and Secretary of State of said proposed state \* \* \*."

Article 12, Section 7 of the Constitution of the State of New Mexico provides that:

"The principal of the permanent school fund shall be invested in the bonds of the state or Territory of New Mexico, or of any county, city, town, board of education or other school district therein. 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. All losses from such funds, however occurring, shall be reimbursed by the state."

Section 7-208 of the New Mexico Compilation provides as follows:

"No **monies** of this state belonging to any sinking fund or other fund, except those mentioned in the following section hereof, shall be invested by the state treasurer in any form of security without the prior approval of such investment by the state board of finance. The state board of finance, prior to approving any such investment shall make an investigation of the validity of any such security, including the authority for the issuance thereof and all proceedings leading up to such issuance and of the adequacy of the means provided for the payment of principal and interest of such security, and shall by resolution adopted at a meeting of said board recite its findings on all said matters." (Emphasis ours)

Section 7-210 of the New Mexico 1941 Compilation provides as follows:

"The state treasurer is hereby authorized, with the approval of those officers and boards whose approval is required by law, to invest **any part of the permanent school fund, or of any other fund derived from lands granted to the state of New Mexico**, by any act of congress, in any bonds, notes or debentures of the United States of America. In making any such investment, the state treasurer is authorized to purchase said bonds, notes or debentures at their current market value, and any premium paid on any such purchase shall be refunded from the interest subsequently accruing on such bonds, notes or debentures during such period of time not exceeding three (3) years, as the state treasurer may determine."

Section 8-117 of the New Mexico 1941 Compilation provides as follows:

"The state treasurer shall keep the permanent **funds** enumerated in this section, invested in safe interest-bearing securities, and which said funds shall forever be kept intact and inviolable, as hereinafter provided, viz.:" (The various enumerated funds have been omitted.)

We call attention again at this time to Section 7-210 of the New Mexico 1941 Compilation which authorizes the investment of the permanent school fund or of any fund derived from lands granted to the State of New Mexico by any act of Congress in any bonds, notes or debentures of the United States of America. This section was enacted as Section 1 of Chapter 99 of the Laws of 1933 which was Senate Bill No. 199. A check of the legislative records has disclosed that this act was passed unanimously without any dissenting votes in both the Senate and the House. Therefore, under the specific provision of Article 12, Section 7 of the Constitution of New Mexico wherein by three-fourths vote of the legislature funds may be invested in other interest-bearing securities than enumerated in the said section and article of the Constitution, it is clear that the state treasurer is authorized to invest funds pursuant to the provision of Section 7-210 of the New Mexico 1941 Compilation, subject to the approval of the officers and boards whose approval is required by law.

We at this time call attention to the portion of this section above underlined wherein the state treasurer is specifically authorized, with the proper approval, to invest **any** part of the permanent school fund or of any other fund described in said section in United States bonds, notes or debentures. We submit that it is clear that the present highway debentures are a portion of the various state funds that they are now a part of.

It is noted that in Section 7-208 of the New Mexico 1941 Compilation it is provided that: "No **monies** of this state belonging to any sinking or other fund except those mentioned in the following section hereof shall be invested \* \* \*." However, in Section 7-210 which was passed eight years after Section 7-208, the treasurer is authorized to invest any portion of certain **funds** in government bonds, thereby indicating that it was not intended to limit the investment in government bonds by the amount of available money not already invested in other forms of securities. A history of the investment in government bonds in the State of New Mexico fully sustains this interpretation. See State vs. Watts 34 N.M. 451, 283 Pac. 905. In this case it is pointed out that a custom had grown up among the state treasurers to invest in government bonds although government bonds were not allowed to be invested in under the provisions of Article 12, Section 7 of the Constitution of the State of New Mexico, and the treasurer in this case was enjoined from investing in government bonds.

The 1933 legislature saw fit to unanimously pass an act authorizing the investment of state funds in government bonds and possibly feeling that government bonds were a superior type of investment to other investments that had at that time been made under the limited types of securities which the state was allowed to invest in, it was no doubt considered that the state treasurer, together with the various boards necessary to approve investments, might see fit to re-invest or invest in government bonds rather than the type of securities then invested in. Therefore, it was specifically provided that

**any part** of the permanent school **fund** or of any other fund derived from lands granted to the State of New Mexico by an act of Congress could be invested in bonds, notes or debentures of the United States of America.

The word "fund" was used instead of the word "money" which had been used in the prior law which was Chapter 86 of the Laws of 1925, which is Section 7-208 of the New Mexico 1941 Compilation. The word "funds" is a much broader word than the word "money" and has been so held by many cases. See Ramsey vs. Cox, 28 Ark. 368 wherein it was stated:

"Webster defines the word 'funds' as 'the stock of a national bank; public securities; evidences of money lent to government, for which interest is paid at prescribed intervals.'"

See also the following cases:

Davis vs. State, 116, 118 Neb. 828, 226 N. W. 449;

Johnson vs. State, 37 Ga. App. 129, 139 S. E. 118, 119;

State vs. Davis, 85 Ohio St. 43, 96 N. E. 1022, 1025;

Sherwood vs. Home Savings Bank, 131 Iowa 528, 109 N. W. 9, 11;

U.S. vs. Smith 152, Fed. 542, 544, citing U.S. vs. Greve 65 Fed. 489;

State vs. O'Conner 58 N. Dak. 554, 226 N. W. 601, 602.

The court stated in National Surety Company vs. Williams 74 Fla. 446, 77 S. 212, 221 that a misappropriation of funds does not necessarily mean a misappropriation of actual cash because funds is a much more comprehensive term and may include other assets or property.

It is therefore my opinion that Section 7-210 of the New Mexico 1941 Compilation, in authorizing the Treasurer with the proper approval to invest **any part** of certain funds in government bonds, authorizes him to invest amounts which have already been invested in other bonds and would, therefore, authorize him to sell bonds which are a portion of such fund and take the proceeds of such sale and invest it in government bonds. It is further my opinion that the treasurer under this section, and subject to proper approval may exchange highway debenture bonds now constituting a portion of such permanent funds for government bonds.

The Honorable Emerson Watts, formerly state treasurer of the State of New Mexico, on July 1, 1929 requested an opinion from the Honorable M. A. Otero, Jr., then attorney general of the State of New Mexico, wherein the state treasurer stated that he contemplated purchasing state highway debentures in the amount of \$ 1,000,000.00 or

more as funds are available in the treasury from funds other than trust funds and re-selling the debentures immediately upon purchase to bond firms or others interested in these securities. In response to this request, the attorney general stated in an official opinion:

"However, since you have announced that you would not purchase these debentures as an investment for "Trust Funds," and since your contemplated purchase of the same from funds other than "Trust Funds" (assuming that you actually have sufficient other funds on hand) is not for the purpose of an investment of public funds, as the statute provides, but is simply for the purpose of getting around the law by acting as a sort of "broker" for the State Highway Commission, I should say that there is no authority in law for you to do so.

"At the same time will state that I have been unable to find anything in our statutes specifically prohibiting you from acting as a 'broker' for the sale of the Highway Commission's debentures, if you feel that you wish to do so. That, of course, is a **matter of policy** for you to decide and which I will not assume to officially advise you on. (Emphasis ours.)

It is noted that while the attorney general did not favor the procedure, he was unable to say that the statutes prohibited the state treasurer from acting as a broker and held that the question was one of policy. While this office is of the same opinion as Mr. Otero was in connection with the matter that Mr. Otero was passing on, we note that in this instance the state is not attempting to act as a broker but is merely attempting to reinvest its funds for the substantial benefit of the beneficiaries of the various state funds. In other words, it is conceivable that our laws would prohibit the state treasurer together with the proper boards from entering into the brokerage business while it would not prohibit the proper re-investment of funds. However, on the other hand, if the state treasurer together with the boards approving investments has the power to use the state's money as a brokerage business, they would certainly have the power to re-invest this money under the present contemplated plan. This question was passed upon by the District Court of Santa Fe County and it was held by the presiding district Judge, the Honorable Reed Holloman, that the plan proposed by the treasurer was legal and not prohibited by the statutes of the State of New Mexico. While this case was appealed to the Supreme Court of New Mexico, see *State vs. Watts, Supra*, the Supreme Court did not pass upon this question, and, therefore, the opinion of Judge Holloman is the only court opinion given upon this question which goes much further than it is necessary to go in this instance to hold the plan now contemplated legal.

In view of the fact that a District Court held fifteen years ago, under substantially the same statutes that we are now considering, that a treasurer could sell bonds and the attorney general, prior to such decision, had held that it was a matter of policy to be decided by the treasurer, we feel compelled to follow the decision of the District Court.

In addition, we wish to point out that Section 7-210 of the New Mexico 1941 Compilation has been passed subsequent to the time of the above mentioned court decision which

would seem to indicate that the legislature intended to allow the investment in government bonds of any portion of any funds in government bonds. This statute strengthens the reasons for the result arrived at by Judge Holloman.

Our research has only disclosed two reported cases passing upon a similar situation and statutes sufficiently analogous to the one involved to be of any benefit at all in determining the matter. See *National Surety Company vs. State*, 111 Okla. 180, 239 Pac. 257 and *National Surety Company vs. State*, 239 Pac. 262. The second case was decided only a few weeks after the first case was decided and both involved a similar question. The second case did not discuss the problem now considered, but merely referred to the previous opinion. We will, therefore, in this opinion only refer to the first case which involved a county treasurer who had exchanged various bonds for other bonds of a class allowed to be invested in by the statute. The question was raised as is raised in this opinion whether the treasurer may exchange bonds which have been purchased as an investment for other bonds which could have been purchased under the statute. The court held that the treasurer could not and the State of Oklahoma obtained a judgment against the treasurer and his surety for the value of the bonds exchanged, even though it was agreed that no intentional wrong was done. The court stated:

"According to the agreed statement of facts the county treasurer of Comanche county purchased United States bonds with sinking funds belonging to his county, and by reason of having exchanged them for Devol City and Wyona City bonds he was unable to act for and turn over to the county the securities originally purchased by him. The law and agreed statement of facts supports the judgment of the trial court in favor of the plaintiff and against the defendants for the value of the securities originally purchased by the treasurer."

It is noted that the question was not raised concerning whether the treasurer was entitled to a set-off for the value of the bonds which he actually had in his possession and that the treasurer and his surety were held liable for the entire amount exchanged without any set-off for the value of the securities actually in the possession of the treasurer. This question of possible liability raises a very serious question in this matter and one which we have fully weighed before arriving at the result that we have herein arrived at. The statutes of the State of Oklahoma are in some respects similar to the statutes of the State of New Mexico. Section 8580 of the Compiled Oklahoma Statutes of 1921 provides in part:

"The county treasurer \* \* \* shall invest all sinking fund **money** now in the respective treasurer's \* \* \*."

It is noted that Section 8580 provides that the treasurer shall invest money while Section 7-210 of the New Mexico 1941 Compilation provides that the treasurer may invest any portion of particular funds. Further, Section 8573 of the Oklahoma Compilation provided a manner of selling securities and the treasurer was specifically not given the power to sell. Section 8580 further provided that the securities invested in

should mature before the maturity of the bonds for which said sinking money was collected. The court based its opinion largely upon these two provisions and in effect contended that since the treasurer was specifically not given any power to sell that he could not exchange and that the condition concerning the maturity of securities invested in negated any idea of a reinvestment. Therefore, upon analyzing this case, we find that the statutes are sufficiently different to justify a different result in New Mexico than was arrived at in Oklahoma under different statutory provisions.

It is, therefore, our opinion that the answer to questions one and two should be in the affirmative. In further support of this opinion, we quote from 103 A.L.R. 623:

"Directions for the care of public funds in the control of boards or officials are provided in nearly all jurisdictions, generally by statutes which specifically regulate such control. The question of the power of such boards or officials to depart from the literal requirements in respect of deposits, loans, or investment of such funds has been before the courts quite frequently, but in most cases the courts have adhered quite closely to the rule that such power can be exercised only where the surrounding circumstances appear to justify such departure, in the view that the purpose of the statute will be more nearly fulfilled thereby."

While in our opinion the provisions of Section 7-210 require an affirmative answer to both questions one and two, we further believe that the circumstances involved in this request would in any event justify the proposed transaction under the above rule.

In answer to your third question, we find that our statutes do not specifically require that bonds or debentures should be advertised before being sold. However, in this connection we find that the following citation of law would seem to be substantially supported by the weight of authority and sound public policy. Board of Education vs. American National Company. 275 Pac. 285, 290:

"The only morally justifiable sale of any such bonds by a public agency is a public sale, an advertised sale, a competitive bidding sale, and such sales should be conducted by the chairman or president of such board or the treasurer under express authority of the proper officers at a public place. But, of course, such requirements for sale of bonds by a municipal subdivision cannot be said to be mandatory, unless and until the legislature so provides."

The same situation exists here. There is no statute that makes it mandatory that the sale should be advertised and conducted according to the above paragraph. However, it is our feeling that public policy requires a substantial compliance with the conditions enumerated by the Supreme Court of Oklahoma.

Hoping that the above fully answers your questions, I remain

By HARRY L. BIGBEE,

Asst. Atty. General