

OFFICIAL OPINION NO. 76-86, Investment of state public funds

September 14, 1976

Mr. Steve Myers
State Investment Council
Capitol Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 76-86

Investment of state public funds

Dear Mr. Myers:

You have requested an official opinion from this office in regard to the following facts.

FACTS:

The Auditor General, in his latest Audit Report of the Investment Council, has criticized the State Investment Officer for "not investing certain state public funds under the control of the institutions of higher learning." The Auditor General also criticized the institutions of higher learning for "not earning the maximum return available." He recommends they invest their "funds through the Investment Council."

Based on the above facts you ask:

QUESTIONS:

1. Are funds, under the control of the institutions of higher learning, "state public funds" as defined in SDCL 4-5-23?
2. Does the State Investment Officer have the authority and responsibility to invest these funds?
3. If the answer to question number 2 is yes, does the Investment Officer have the

authority to require these funds be deposited with the State Treasurer in order to be pooled for investment purposes (SDCL 4-5-30)?

4. If the answer to question number 3 is no, who has the authority?

5. If the answer to question number 1 is no, does the Commissioner of School and Public Lands then have the authority and responsibility to invest these funds as stated in Section II, Article VIII of the State Constitution?

SDCL 4-5-23 provides:

The state investment officer shall be responsible for the investment of the state public funds as defined in section 4-4-4. All functions, powers, and duties presently vested by law in any officer, official, employee, agency or commission which relates to the investment of state public funds and accounts enumerated in this section are hereby transferred to the state investment officer. Provided, however, such functions, powers and duties shall be advisory only with respect to permanent school and other educational funds.

SDCL 4-4-2 defines state public funds as:

"State Public Funds" shall mean and shall include cash, checks, bills, notes, drafts, stocks, bonds, and other similar mediums of exchange which are received or dispersed under law, including rules or regulations, by a department, institution, commission, or any other agency of state government.

With respect to your first question, it is my opinion that SDCL 4-5-23 does not exempt the funds that you refer to from the investment powers and duties of the State Investment Officer. The reference in the last sentence of SDCL 4-5-23 to "permanent school and other educational funds," I believe refers to the "permanent school and other educational funds," referred to in Article VIII of the State Constitution, which funds are under the control of the Commissioner of School and Public Lands for investment purposes. To interpret "other educational funds" in SDCL 4-5-23 as exempting state public funds in *any* fund relating to education, does not, in my opinion, properly recognize the obvious similarities and relationship between Article VIII, Sections 2 and II of the State Constitution and SDCL 4-5-23. In my opinion the thrust of the last sentence of SDCL 4-5-23 is only to provide that the funds under the control of the Commissioner of School and Public Lands pursuant to Article

VIII, will not be subject to the broad investment powers of the State Investment Officer. If that exception were not provided in SDCL 4-5-23, it would be directly contrary to the provisions of Article VIII, Section II, of the Constitution.

In analyzing your first question, I have not been able to get very specific information about what sort of funds go into these local "institutional restricted funds" referred to in the audit report and your opinion request. From discussing the matter with the Auditor General and members of the Interim Appropriations Committee and LRC staff, it is apparent that one of the most serious problems they have here is to try to get a handle on Just what kind of funds go into these local "institutional restricted fund" accounts in local banks.

In this opinion, I will presume that funds in these local institutional restricted fund accounts, and the investment of those funds, are not made in violation of any federal laws relating to the use of such moneys for any particular program. In his audit report on the State Investment Office functions, the Auditor General himself has essentially started from the point that these local funds exist and that they are earning interest, i.e., they are "invested." My analysis of the question will also begin there and proceed to examine, on the basis of state law only, the legality of these "investments" being made by local institutions. Obviously, I cannot speak to all the possible federal regulations involved or to matters of policy, such as whether or not the Investment Office investments yield a higher rate of return than that realized by investments made on a local basis.

In 1966, the Legislature passed SDCL 4-4-3, which permits the State Treasurer and State Auditor to jointly determine that state public funds can be kept in a local bank account rather than in the State Treasury. In 1971, the Legislature passed SDCL 4-5-23, cited above. That statute in effect says that the *investment* of all state public funds, as defined in SDCL 4-4-4, is to be made by the State Investment Officer. SDCL 4-5-37 further states:

To the extent that the provisions of §§ 4-5-12 to 4-5-39, inclusive, are inconsistent with the provisions of any other law, the provisions of such sections shall be controlling.

SDCL 13-49-1 and 13-49-13 are examples of statutes here that may seem to create a conflict with the above cited statutory provisions. SDCL 13-49-11 and 13-49-13 basically state that the Board of Regents shall have the power to "hold and manage any property belonging to the institutions under its control." Considering the effect of Chapter 4-5, does this statutory power include the power to invest funds in a local account authorized

pursuant to SDCL 4-4-3?

In my opinion, the answer to this question is NO! SDCL 4-5-37 and 4-5-23 indicate to me that the Legislature has said that, except as limited by SDCL 4-5-23, and 28-19-89, when it comes to *investment* of state public funds, the State Investment Officer has the duty and responsibility to make such investments. SDCL 4-5-26(6) indicates to me that bank savings accounts and certificates of deposit are considered as an "investment" of such funds.

The conclusion I reach is that the local institutions may have local accounts of state public funds authorized by SDCL 4-4-3 and that these funds may be in addition to the permanent incidental funds authorized by SDCL 4-5-2 and -3. However, when it comes to making "investments" with moneys in these accounts, I believe the law says that the State Investment Officer, not the local institutions, is empowered to make such investments. This, I believe, means that the State Auditor and State Treasurer will need to exercise careful judgment in a stagnant, non-invested local account. These local institutional accounts may be necessary for cash flow and smooth operation, but they are not a proper way to "invest" state funds. Until the law is changed in this regard, I believe the investment function of state public funds is given exclusively to the State Investment Officer, except as limited by the last sentence of SDCL 4-5-23, discussed previously herein.

The question remaining then is if the funds in the local institutional restricted funds are "public funds" as defined in SDCL 4-5-23. In my opinion, the answer to this question is YES.

SDCL 4-5-23 specifically refers to SDCL 4-4-4 in regard to the definition of state public funds. I believe SDCL 4-4-2 is also of significance here in its defining public funds. That statute provides:

"State public funds" shall mean and shall include cash, checks, bills, notes, drafts, stocks, bonds, and all similar mediums of exchange which are received or dispersed under law, including rules or regulations, by a department, institution, commission, or any other agency of state government.

Read together, I conclude that the above statutes require the conclusion that funds in the local institutional "reserve accounts," authorized by SDCL 4-4-3, are "public funds" and that the investment of these funds is under the control of the State Investment Officer.

Based on the above analysis, the answer to your second question is YES. The answer to question number 3 is also YES, provided, the local funds recognized and established pursuant to SDCL 4-4-3, are in fact being "invested" as discussed herein. Once the State Auditor and State Treasurer determine the need exists for maintaining a non-investment fund in a local bank account, the State Investment Officer does not have the authority to "retrieve" these funds into the state treasury for investment purposes. With respect to those funds which the State Investment Officer has the duty of investing, SDCL 4-5-30 does give him the authority to pool such accounts and together with SDCL 4-4-3, I believe he is given the authority to bring such funds into the state treasury.

In view of the above answers to questions numbered 1 through 3, inclusive, there is no need to answer questions numbered 4 and 5.

Respectfully submitted,

WILLIAM J. JANKLOW
ATTORNEY GENERAL

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