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STATE OF NEBRASKA
OFFICIAL
SEP 18 1992
DEPT. OF JUSTICE

DATE: September 16, 1992

SUBJECT: Public Employees Retirement Board; Authorized Investments for Funding County and State Employees Deferred Compensation Plans

REQUESTED BY: Jack E. Nellson, Director
Public Employees Retirement Systems

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

The Deputy Director of the Public Employees Retirement Systems has requested the Opinion of this Office regarding permissible investments for the deferred compensation plan administered by the Public Employees Retirement Board. The specific question is whether the Nebraska Legislature intended "to make annuities and life insurance policies the exclusive investment vehicles for the state's deferred compensation plan."

We believe that authorized investments for funding the deferred compensation plans are limited by express legislative provision to life insurance policies and fixed or variable annuity contracts.

The deferred compensation plan is established by legislative enactment and the Public Employees Retirement Board is authorized to contract with state and county employees to defer a portion of the employees' income. Neb. Rev. Stat. § 84-1504 (Reissue 1987) states:

> The Public Employees Retirement Board, on behalf of the state, may contract with any state or county employee, including a person under contract providing services to the state or county who is not employed by

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> the University of Nebraska or any of the state colleges or technical community colleges, to defer a portion of such employee's income and may subsequently, with the consent of the employee, purchase a life insurance or fixed or variable annuity contract, for the purpose of funding a deferred compensation plan for the employee, from any insurance company licensed to do business in the state. The total of the premiums paid for the purchase of such life insurance contract or annuity contract and the employee's nondeferred income for any year shall not exceed the limit or limits established by the Internal Revenue Service for such plan. The deferred compensation program shall exist and serve in addition to, and shall not be a part of, any existing retirement or pension system provided for state or county employees or any other benefit program. Any income deferred under such a plan shall continue to be included as regular compensation for the purpose of computing the retirement and pension contributions made or benefits earned by any employee. Any sum so deferred shall not be included in the computation of any taxes withheld on behalf of any such employee.

(Emphasis supplied).

The clear and express language of section 84-1504 reflects that particular life insurance company products, "life insurance or fixed or variable annuity contract," are the intended investment medium for funding the deferred compensation plans. The primary tenet of statutory construction is to ascertain and give effect to legislative intention as expressed in the statute. Ludwig v. Board of County Commissioners, 170 Neb. 600, 103 N.W.2d 838 (1960); Megan v. Boyd County, 133 Neb. 539, 276 N.W.2d 160 (1937). In applying this basic rule to the express statutory language, we believe that insurance policies and fixed or variable annuity contracts offered by life insurance companies are the only authorized investments which may be utilized for funding the plans.

It has been pointed out that there are two components or periods of a deferred compensation plan, the accumulation phase and the distribution phase. Generally described, the accumulation phase is the period during active employment of the plan participant when income amounts are deducted. The distribution phase encompasses the period when qualified amounts are disbursed to the participant in a lump sum or periodic payments based on optional distribution methods selected by the employee. The pertinent statutory provisions do not distinguish between the accumulation and distribution phases for purposes of funding the deferred compensation plans.

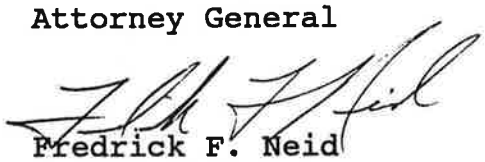
Ownership interests and distribution of plan amounts are addressed in other statutes. Neb. Rev. Stat. § 84-1505 (Reissue 1987) provides that the Retirement Board act as custodian for "all policies and annuity contracts purchased." Neb. Rev. Stat. § 84-1506 (Reissue 1987) establishes a Deferred Compensation Fund to receive benefit payments of "any insurance policies or annuity contracts" and for purposes of disbursing entitled amounts to plan participants.

Further, the provisions of section 84-1504 contemplate that income amounts deferred during active employment of a plan participant (accumulation phase) shall be utilized for purchase of insurance or annuity contracts to fund the plan. This is evident from express statutory language which provides that premium payments for insurance or annuity contracts <u>for any year</u> shall not exceed the limit or limits established by the Internal Revenue Service. Under the Internal Revenue Code, the maximum amount of compensation which may be deferred on an annual basis is the lesser of $7,500.00 or thirty-three and one third percent (33 1/3%) of the participant's includible compensation during the tax year. <u>See</u> I.R.C. § 457(a)(b)(1-3) (1986). It is obvious that the limits apply only during the accumulation phase when income amounts are actually withheld for deferral for income tax purposes.

Based on these statutory provisions, we believe authorized investments for funding the deferred compensation plans are limited to life insurance policies and annuity contracts. Thus, amendment of existing statutes would be necessary to permit use of other classes and kinds of investment for purposes of funding the plans during either the accumulation phases or distribution phases of the deferred compensation plans administered by the Board.

Sincerely yours,

DON STENBERG
Attorney General



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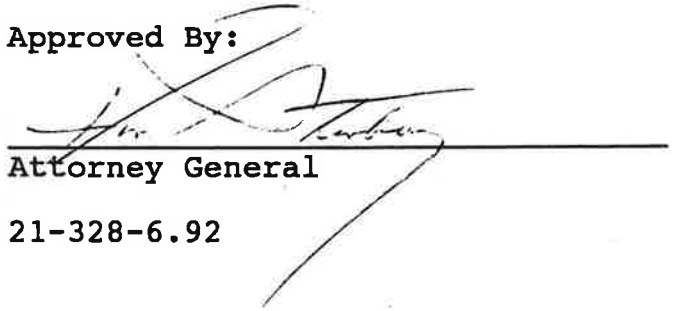

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