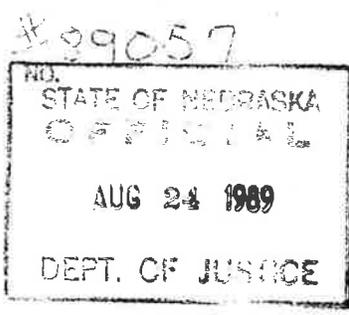


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General



DATE: August 24, 1989
SUBJECT: Public Employees Retirement Systems, Investment Responsibility and Authority
REQUESTED BY: Jack E. Nellson, Director
Public Employees Retirement Systems
WRITTEN BY: Robert M. Spire, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your questions concerning responsibilities of the Public Employees Retirement Systems for investment of funds in retirement programs administered by the Public Employees Retirement Systems.

Review of the appropriate statutes and legislative enactments reflect that, in general, the authority and responsibility for investment of all state funds is reposed in the State Investment Officer and the Nebraska Investment Council. The Public Employees Retirement Board and the Public Employees Retirement Systems has no or limited investment responsibility for the retirement systems under their administration.

Your first question concerns the responsibility for investment of funds for each of the retirement systems administered by the Public Employees Retirement Systems. Investment responsibility and authority relating to the retirement systems are delineated by statute. The investment responsibility for the Nebraska Retirement Fund for Judges, the School Retirement System, and the Nebraska State Patrolmen's Retirement System is reposed in the Nebraska Investment Council and the State Investment Officer pursuant to Neb.Rev.Stat. §§24-2704 (Cum. Supp. 1988), 79-1503 (Reissue 1987), and 81-2018 (Reissue 1987), respectively.

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The responsibility for investment of funds for the County Employees Retirement System is not expressly provided for by the County Employees Retirement Act, Neb.Rev.Stat. §§23-2301 et seq. However, the Act does provide that it is the duty of the Public Employees Retirement Board to administer the Act. The Act provides that investment options or accounts will be offered for members by life insurance companies or other investment managers. In keeping with the administrative responsibilities of the Public Employees Retirement Board, it is the Board's responsibility to contract for or designate investment managers to perform the investment functions. In this sense, the Board has the limited investment responsibility to engage investment managers but has no express direct investment authority under the Act.

Similarly, the responsibility for investment of funds for the State Employees Retirement System is not expressly provided for by State Employees Retirement Act, Neb.Rev.Stat. §§84-1301 et seq. The Act generally provides that the employee account portions of the State Employees Retirement Fund be invested in various investment mediums including a guaranteed investment account and an equities account. The actual investment of funds is completed by an investment manager designated to invest these funds.

Neb.Rev.Stat. §84-1309.01 (Reissue 1987), in part, states:

"Any change in the type of investment of money in the State Employee Retirement Fund by the state investment officer shall be subject to approval by the Public Employees Retirement Board. . . ."

This statute was adopted by the legislature in 1984 and essentially reposes final decision-making responsibility for investments in the Public Employees Retirement Board. The statute does contemplate that investment functions shall be performed by the state investment officer. Review of the legislative history reflects that the legislative intent is that the final decision-making responsibility for investments of the State Employees Retirement Fund be reposed in the Public Employees Retirement Board.

Your second question relates to the investment responsibility for employer account portions of the State Employees Retirement Fund. As stated above, the final decision-making responsibility for investments of the State Employees Retirement Fund is reposed in the Retirement Board.

You also inquire whether "employee funds" may be commingled with "employer funds" when the employee has selected the guaranteed income option. By "employer funds" and "employee funds" it is

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assumed that you mean those employee accounts arising from employee salary deductions and state contributions, respectively.

Essentially, your question is whether the same investment medium (guaranteed investment contract) may be utilized for both employer and employee accounts. Combining funds from different accounts is an acceptable practice under fiduciary standards. Trust funds have been combined for investment, and the practice is generally recognized as proper for a trustee. No difficulty arises from the combining of trust funds for investment, the units of the trust, and other funds in the participation being of equal value, clearly severable, and distinguishable, where there is a record of each participant so that a severance can be made. 76 Am.Jur.2d TRUSTS § 401 (1975).

It is our conclusion that the same investment medium, Guaranteed Income Account, may be utilized for investment of funds in both the employee and employer accounts. If the same investment medium is used, it is necessary that the employee would have elected the option statutorily referred to as the "guaranteed investment account," and that separate accounts and records be maintained.

The next question you have asked is whether the Public Employees Retirement Board has any responsibility to monitor the investment of retirement system funds "held by the State Investment Council." Generally, no. In the first instance, no retirement system funds are directly held by the Nebraska Investment Council or the State Investment Officer.

Your question appears to be whether the Retirement Board has any oversight responsibility concerning investment decisions or policies of the Nebraska Investment Council or the State Investment Officer. With the exception of the provisions of Neb.Rev.Stat. §84-1309.01 (Reissue 1987), discussed above, the Retirement Board has no statutory duty or authority to monitor investment decisions of funds under the investment authority of the Nebraska Investment Council or the State Investment Officer. Obviously, the Retirement Systems has a duty to monitor investment matters and results to the limited extent necessary to maintain proper records and to communicate information to the members of the retirement systems.

You have also inquired whether the Public Employees Retirement Board has any "responsibility, obligation or liability to meet benefit payments, both current and future, which accrue to member under the School, Judges and Patrol Retirement Systems." The very purpose and function of the Public Employees Retirement Board is to administer these retirement systems. Administration includes disbursement of entitled benefits to the members. Accordingly, the Board has the responsibility and obligation to meet benefit

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payments for members of the retirement systems under the administration of the Board.

The Board's obligation for "assurance" that funds will be available is limited. It is limited in the sense that the Retirement is not an "insurer" of benefits. However, the Board has an obligation to ascertain funding requirements for the retirement programs and communicate this information to the legislature for appropriation of funds to the systems.

Further, Neb.Rev.Stat. §84-1513 (Reissue 1987) states:

No member of the Public Employees Retirement Board shall be personally liable, except in cases of willful dishonesty, gross negligence, or intentional violations of law, for actions relating to investment decisions pertaining to the retirement funds of retirement plans administered by the board.

Accordingly, it is our opinion that no personal liability applies to board members except, for the actions or omissions expressed in the statute.

Lastly, you have inquired whether the "State Treasurer is the custodian of the State and County Retirement Systems' holdings, i.e. are the securities to be held in the name of the State Treasurer?" It is our opinion that the State Treasurer is the custodian of all securities and investments of the State Employees Retirement Fund but is not the custodian of securities and investments of the County Employees Retirement Systems.

Neb.Rev.Stat. §72-1250 (Reissue 1986), in part, states:

All securities purchased or held shall be in the custody of the State Treasurer who may deposit with a fiscal agent in any financial institution, approved by the Nebraska Investment Council, such securities as he shall consider advisable to be held in safekeeping by such agent for collection of principal and interest, or of the proceeds of sale thereof or, at the direction of the state investment officer, the State Treasurer shall have such securities held in the name of a nominee. . . .

Accordingly, since amounts in the State Employees Retirement Fund are state funds, securities purchased are to be in the custody of the State Treasurer or deposited with a fiscal agent approved by the Nebraska Investment Council. The individual securities need not be held in the Treasurer's name since the statute specifically authorizes that securities may be held in nominee name.

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Securities and investments of the County Employees Retirement Systems are not within the custody of the State Treasurer because these funds are not state funds. Further, these funds originating in the counties never come into the possession of the State Treasurer or jurisdiction of the State Investment Officer. The amounts are paid directly to the life insurance company or trust company designated by the Retirement Board in accordance with the County Employees Retirement Act, Neb.Rev.Stat. §§23-2301 et seq.

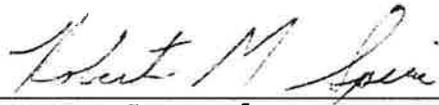
For these reasons, it is our opinion that the securities purchased for the State Employees Retirement Fund, but not securities of the County Employees Retirement Systems, are to be in the custody of the State Treasurer or a fiscal agent in any financial institution approved by the Nebraska Investment Council.

Very truly yours,

ROBERT M. SPIRE
Attorney General


Fredrick F. Neid
Assistant Attorney General

Approved By:



Attorney General

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