

N.D.A.G. Letter to Omdahl (May 29, 1990)

May 29, 1990

Lt. Governor Lloyd B. Omdahl
Chairman
State Investment Board
P.O. Box 7100
Bismarck, ND 58502-7100

Dear Lt. Governor Omdahl:

Thank you for your March 5, 1990, letter in which you ask me to address three questions relating to the fiduciary responsibilities of the North Dakota State Investment Board (Board). Your questions are:

1. What is the fiduciary responsibility of the Board with respect to the funds listed in N.D.C.C. § 21-10-06?
2. Assuming that the Board has the primary fiduciary responsibility with respect to each of the above-listed funds, does the Board have the statutory authority to delegate that responsibility to the governing body of each individual fund?
3. Which of these takes precedence over the other -- the Board's policies on investment goals and objectives or each individual fund's policies on investment goals and objectives?

I will address the questions in the order presented.

The Board is charged with the investment of the funds listed in N.D.C.C. § 21-10-06. N.D.C.C. § 21-10-02. The Board also is directed to approve general types of securities in which these funds may be invested and to set policies and procedures regulating securities transactions on behalf of the funds. Id.

N.D.C.C. § 21-10-02.1 provides as follows:

21-10-02.1. Board--Policies--Investment goals and objectives. The board shall establish policies on investment goals and objectives for the funds enumerated in section 21-10-06. The policies must provide for:

1. The definition and assignment of duties and responsibilities to advisory services and persons employed by the board.
2. Acceptable rates or return, liquidity, and levels of risk.

3. Long-range asset allocation goals.
4. Guidelines for the selection and redemption of investments.
5. Investment diversification, investment quality, qualification of advisory services, and amounts to be invested by advisory services.
6. The type of reports and procedures to be used in evaluating performance.

Each fund enumerated in section 21-10-06 shall submit to the board the fund's policies on investment goals and objectives. The state investment board shall develop an asset allocation plan for each fund in accordance with the investment goals and objectives of the fund, subject to the approval of the governing body of the fund.

N.D.C.C. § 21-10-02.1; N.D. Sess. Laws ch. 667, § 6. The last sentence of this section was added by the 1989 Legislative Assembly and is effective only through June 30, 1991. 1989 N.D. Sess. Laws ch. 667, §§ 6, 15.

"The Board is charged with the investment of" the several state funds listed in N.D.C.C. § 21-10-06. N.D.C.C. § 21-10-06; 1989 N.D. Sess. Laws ch. 667, §§ 7, 15.

The Board has the authority to appoint an investment director or an advisory service experienced in, and with considerable knowledge of, the field of investments. N.D.C.C. § 21-10-02. The powers and duties of an investment director are set out in N.D.C.C. § 21-10-05 as follows:

21-10-05. Director--Powers and duties. Subject to the limitations contained in the law or the policymaking regulations or resolutions promulgated by the board, the investment director shall have the power to make purchases, sales, exchanges, investments, and reinvestments of the funds under the management of the board. This section shall constitute a continuing appropriation of all moneys required for the making of investments of funds under the management of the board. The director shall see that moneys invested are at all times handled in the best interests of the funds. Securities or investments may be sold or exchanged for other securities or investments.

The investment director shall formulate and recommend to the investment board for approval, investment regulations or resolutions pertaining to the kind or nature of investments and limitations, conditions, and restrictions upon the methods, practices or procedures for investment, reinvestment, purchase, sale, or exchange transactions which should govern the investment of funds under this chapter.

N.D.C.C. § 21-10-05.

The Board is required to apply the prudent investor rule with respect to the funds under its supervision. N.D.C.C. § 21-10-07. This rule is defined as follows:

The "prudent investor rule" means that in making investments the fiduciaries shall exercise the judgment and care, under the circumstances then prevailing, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as well as probable income.

N.D.C.C. § 21-10-07.

In 1989, the Legislative Assembly also added a sentence to N.D.C.C. § 21-10-07 providing that the funds belonging to the Teachers' Fund For Retirement (TFFR) and the Public Employees Retirement System (PERS) are to be invested exclusively for the benefit of their members and in accordance with the investment goals and objectives of each of these funds. N.D.C.C. § 21-10-07; 1989 N.D. Sess. Laws ch. 667, § 9. This sentence is effective only through June 30, 1991. 1989 N.D. Sess. Laws ch. 667, § 15.

N.D.C.C. § 21-10-02.1 contains contradictory statements with respect to the establishment of policies on investment goals and objectives. The first sentence of this section provides that it is the Board that is to establish policies on investment goals and objectives for the individual funds. The final two sentences of this section, however, provide that in addition to each fund submitting its policies on investment goals and objectives to the Board, the Board's asset allocation plan for each fund must be in accordance with the investment goals and objectives of each fund and is subject to the approval of the governing body of each fund.

Prior to the Legislative Assembly's amendment of N.D.C.C. § 21-10-02.1 in 1989, the individual funds were required to submit their policies on investment goals and objectives to the Board, but the Board was not directed or required to comply with those policies. However, for the current biennium, the Legislative Assembly has mandated development of an asset allocation plan for each fund in accordance with that fund's investment goals and objectives. The Legislative Assembly also requires approval by the governing body of each fund before the asset allocation plan developed for each fund by the Board may be implemented.

The new provision added to N.D.C.C. § 21-10-07 by the Legislative Assembly in 1989, also effective only for the current biennium, also contradicts N.D.C.C. § 21-10-02.1. N.D.C.C. § 21-10-02.1 directs the Board to establish policies on investment goals and objectives for all the funds. For the present biennium, however, N.D.C.C. § 21-10-07 directs the Board to invest the funds of the TFFR and PERS exclusively for the benefit of

their members and in accordance with the investment goals and objectives of those two individual funds.

The practical effect of the 1989 amendments is that the Board has no fiduciary responsibilities with respect to developing and establishing investment goals and objectives for any fund, but does have fiduciary responsibilities with respect to developing asset allocation plans once each fund has developed and submitted its investment goals and objectives. Since enactment of the 1989 amendments, the Board also has fiduciary responsibilities with respect to the implementation of the investment goals and objectives established by the TFFR Board and the PERS Board.

In arriving at this interpretation of the Board's fiduciary responsibilities, I have attempted to reconcile the apparently contradictory language. To the extent that has not been possible, I have given effect to the 1989 amendments because they are later in time and are more specific than the general language of N.D.C.C. § 21-10-02.1 on this subject. See N.D.C.C. § 1-02-07 (when an irreconcilable conflict exists between a general provision and a special provision, the special provision prevails unless the general provision is enacted later and the Legislative Assembly intended it should prevail). I have also relied upon legislative history with respect to the effect of these amendments. See N.D.C.C. § 1-02-39 (in determining the legislative intent with respect to an ambiguous statute, the legislative history may be considered).

In his testimony before the Senate State and Federal Government Committee on January 17, 1989, Assistant Attorney General Steven E. Noack, who drafted the amendments discussed above, stated:

[The amendment to N.D.C.C. § 21-10-02.1] is intended to afford each fund protection and control over the investments. Specifically, the amendment to this section provides that "the state investment board shall develop an asset allocation plan for each fund in accordance with the investment goals and objectives of the fund, subject to the approval of the governing body of the fund." Therefore, the governing body of each fund . . . must approve the asset allocation plan developed by the [Board] for the fund.

Hearings on S. 2030 Before the Senate Comm. on State and Fed. Gov't, 51st N.D. Leg. Ass. (January 17, 1989) (statement of Steven E. Noack, assistant attorney general).

Assistant Attorney General Noack also testified that the amendment to N.D.C.C. § 21-10-07:

restricts the [Board's] investment of the retirement funds. As drafted, the retirement funds of [the teachers' fund for retirement and the public employees retirement system] must be invested exclusively for the benefit of their members and in accordance with the respective fund's investment goals and objectives.

Id.

Based upon the foregoing analysis, it is my opinion that the Board's fiduciary responsibilities include establishing and implementing policies in accordance with N.D.C.C. § 21-10-02.1 and approving investment regulations or resolutions recommended to it by the investment director pursuant to N.D.C.C. § 21-10-05. It is my opinion that in carrying out its fiduciary responsibilities the Board also is subject to the prudent investor rule as provided in N.D.C.C. § 21-10-07. Furthermore, it is my opinion that during the current biennium, the asset allocation plan developed by the Board for each fund pursuant to N.D.C.C. § 21-10-02.1 must be in accordance with the investment goals and objectives of each fund and is subject to the approval of the governing body of each fund. N.D.C.C. § 21-10-02.1. Finally, it is my opinion that during the current biennium, the Board must invest TFFR and PERS moneys in accordance with the investment goals and objectives of the governing body of each of those funds. N.D.C.C. § 21-10-07.

A public officer "may not delegate to an agent power to do an act required by statute involving judgment and discretion unless authorized by statute." State v. Johnston, 253 Iowa 674, _____, 113 N.W.2d 309, 312 (1962). See also Nelms v. Civil Serv. Comm'n, 300 Minn. 319, _____, 220 N.W.2d 300, 301 (1974); School Dist. No. 3 v. Callahan, 237 Wis. 560, _____, 297 N.W. 407 (1941). Thus, in the absence of statutory authorization, the Board lacks the authority to delegate its discretionary responsibilities to the governing body of each fund.

The powers and duties of the Board require the exercise of judgment and discretion. For example, the Board is responsible for establishing policies on investment goals and objectives, including establishment of acceptable rates or returns, liquidity, and levels of risk. See N.D.C.C. § 21-10-02.1(2). N.D.C.C. ch. 21-10 authorizes the Board to delegate many of its responsibilities to an investment director. N.D.C.C. §§ 21-10-02, 21-10-05. N.D.C.C. ch. 21-10, however, does not authorize the Board to delegate any of its responsibilities to the governing bodies of the funds. Therefore, it is my opinion that the Board does not have the statutory authority to delegate its fiduciary responsibilities to the governing body of each individual fund.

Although the Board is required to exercise its own judgment and discretion in carrying out its fiduciary responsibilities, it may also enlist the aid of the governing bodies of the funds to investigate matters, make recommendations, and draft proposed policies. See School Dist. No. 3 v. Callahan, 297 N.W. at 415. Furthermore, after the Board itself has exercised its own judgment it may, under proper conditions, delegate to the governing bodies of the funds ministerial acts to accomplish the result of the Board's exercise of its judgment and discretion. See id. at 416.

As the analysis in response to your first question indicates, during the current biennium, the Board's asset allocation plan developed for each fund must be in accordance with the investment goals and objectives of each fund. Furthermore, the asset allocation plan is subject to the approval of the governing body of each fund. It is my opinion, therefore, that

during the current biennium, the policies on investment goals and objectives of the governing body of each individual fund take precedence over the Board's policies on investment goals and objectives.

I trust that this letter is responsive to your questions. If you have additional questions or would like to discuss this matter in more detail, please get in touch with me.

Sincerely,

Nicholas J. Spaeth

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