

## OPINION NO. 74-102

## Syllabus:

The Ohio Public Employees Deferred Compensation Board may invest money it holds for employers in the equity and debt instruments described in Chapter 145. of the Revised Code without violating Article VIII, Section 4 of the Ohio Constitution.

To: J. Douglass Peters, Executive Director, Public Employees Retirement System of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, December 11, 1974

I have before me your request for my opinion, which reads as follows:

"Under the provisions of Amended Substitute Senate Bill No. 38, which enacts Sections 145.71, 145.72 and 145.73 of the Revised Code, the Ohio Public Employees Deferred Compensation Board, utilizing staff of the Public Employees Retirement Board, has begun planning a deferred compensation program for public employees in Ohio.

"The act provides, in part, that the Board shall offer to participants a reasonable number of options for the investment of deferred salary funds including, among others, variable annuities. The offering of variable annuities necessarily suggests the purchase of equity investments.

"Deferred compensation, to qualify for favorable tax treatment, must remain funds of the employer, according to our understanding of rulings by Internal Revenue Service. If this is true, salary deferred by a state employee would remain an asset of his employer--the State of Ohio. Similarly, salary deferred by an employee of a political subdivision would remain an asset of that political subdivision.

"We note that the Ohio Constitution prohibits the State from becoming a stockholder in any company. (Article VIII Section 4)

"This brings us to our question:

"May the Ohio Public Employees Deferred Compensation Board invest money it holds for employers in the equity and debt instruments described in Chapter 145 of the Revised Code?"

R.C. 145.72 reads in part as follows:

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"The Ohio Public Employees Deferred Compensation Board may exercise the same powers granted by section 145.09 of the Revised Code necessary to its functions. \* \* \*"

R.C. 145.73 reads in pertinent part as follows:

"(A) The Ohio Public Employees Deferred Compensation Board shall initiate, plan, expedite, and, subject to an appropriate assurance of the approval of the Internal Revenue Service, and thereafter administer on behalf of all participating employees and continuing members, and alter as required, a program for deferral of compensation, including a reasonable number of options to the employee for the investment of deferred funds, including life insurance, annuities, variable annuities, regulated investment trusts, pooled investment funds managed by the Board, or other forms of investment approved by the Board, always in such form as will assure the desired tax treatment of such funds.

"(B) Every employer of an eligible employee shall contract with such employee upon application for his participation in a deferred compensation program offered by the Board. \* \* \*"

"(C) The Board shall, subject to any applicable contract provisions, undertake to obtain as favorable conditions of tax treatment as possible, both in the initial programs and any permitted alterations thereof or additions thereto, as to such matters as terms of distribution, designation of beneficiaries, withdrawal upon disability, financial hardship, or termination of public employment, and other optional provisions. \* \* \*"

Article VIII, Section 4 of the Ohio Constitution of 1851 reads as follow:

"The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

In order to determine whether or not the investment of deferred compensation funds by the Ohio Public Employees Deferred Compensation Board in equity securities would violate the Constitutional prohibition against investing funds of the State in private associations or corporations, the nature or character of such funds must be determined.

The term "public moneys" is defined in R.C. Chapter 135, which sets forth the Uniform Depository Act. R.C. 135.01 (K) reads as follows:

"'Public moneys' means all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody of the treasurer of state or of the treasurer of any subdivision. 'Public moneys of the state' includes all such moneys coming lawfully into the possession of the treasurer of state; and 'public moneys of a subdivision' includes all such moneys coming lawfully into the possession of the treasurer of the subdivision."

It will be observed that the above definition is quite broad and it would seem that the term "public moneys" would encompass all moneys coming lawfully into the possession of the State Treasurer. However, a distinction has been drawn in the case law of numerous jurisdictions between public funds and state funds, or more accurately, moneys belonging to the State. These cases recognize that not all funds in the state treasury are state funds for all purposes. Although there is some confusion in the use of the terms, there is general agreement on this concept.

This distinction was considered by the Supreme Court of Washington in State, ex rel. State Employees' Retirement Board v. Yelle, 201 P. 2d 172 (1948). The question with which the Court was concerned was whether the repayment of a separating member's contribution could be made from the State Employees' Retirement Fund, which is subject to the control and management of the Retirement Board, in the absence of an appropriation. The respondent State Auditor contended that any such refund would be in violation of the Washington Constitution, which provides that no moneys shall be paid out of the treasury of the state, or out of any of its funds except pursuant to appropriation. The relator Retirement Board, on the other hand, contended that the funds of the retirement system are not public funds within the meaning of the Washington Constitution, but are proprietary funds committed to the custody of the state treasurer as trustee for particular objects and purposes, and are subject to disbursement solely upon authorization of the retirement board, without an appropriation by the legislature.

In holding for the relator Retirement Board, the Court stated as follows at p. 178-79:

"The state, in the exercise of its police powers, can provide by legislative act that all funds coming into the hands of the state treasurer shall become state funds, but the legislature may, in its discretion, also provide for collection and administration of certain funds without making them state or public funds.

"The legislature, in creating a state employees' retirement system, had the power to elect to create a fund for that purpose either by creating a state fund to be kept in the state treasury under the control of the state treasurer and the

state auditor and disburseable only in pursuance of an appropriation, or by creating a special fund, of a proprietary nature, designed to meet specific objectives, and to be placed in the custody of the state treasurer acting ex officio as a member of the retirement system, rather than in his constitutional capacity, and to be expended as directed by the legislature without a specific appropriation.

"The mere fact that the state treasurer may be made the custodian of a particular fund and may be required to render certain services with respect to such fund does not, of itself, make moneys, so received and held by him 'state funds in the state treasury' within the meaning of the constitutional requirement that such funds be disbursed only on appropriation.

"The legislature has the authority to determine the nature, place, and character of custody and requisites for expenditure of a fund created by it, except in cases where the constitution requires moneys to be paid into the state treasury."

Of similar import is Pensioners Protection Ass'n. et al., v. Davis, 150 P. 2d 974 (1944), wherein the Supreme Court of Colorado held at p. 976 as follows:

"The term 'public funds' means funds belonging to the state, and the term does not apply to special funds, which are collected or voluntarily contributed, for sole benefit of the contributors and of which the state is merely the custodian."

Note that the foregoing cases use the term "public funds" to mean "state funds." Nevertheless, they hold that not all moneys held in the state treasury are monies of the state. See also State, ex rel. Stearns v. Olson, 195 N.W. 714 (1919); Allen et al. v. City of Omaha, 2286 N.W. 916 (1939); State, ex rel. St. Louis Police Relief Ass'n. v. Igoe, 107 S.W. 2d 929 (1937).

Also relevant is the case of Sendak v. Trustees of Indiana University, 260 N.E. 2d 601 (1970), wherein an action was brought challenging the right of the Trustees of Indiana University to use gifts and bequests from private donors to invest in corporate stock. The question with which the Court was concerned was whether the Board of Trustees of Indiana University is "the State" within the meaning of Article II, Section 12 of the Indiana Constitution which provides as follows:

"The State shall not be a stockholder in any bank after the expiration of the present bank charter; nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association."

The Supreme Court of Indiana held that the Board of Trustees of Indiana University was authorized to make and hold investments

in the stock of private corporations out of money received by it from private sources, notwithstanding the constitutional prohibition against the state becoming a stockholder in any corporation.

In arriving at this conclusion, the Court emphasized the fact that the Board of Trustees of Indiana University acts in a dual capacity as directors and managers of the university's operation and as trustees of private trusts created by private donors; and in first capacity it is a corporate body politic governing Indiana University and in second capacity it has the common-law duties and privileges of a private trustee to administer funds which the statute authorizes it to accept on terms and conditions fixed by private donors.

In light of the foregoing authorities, it can be seen that moneys which are public funds under a statute such as R.C. 135.01 are not necessarily state funds for purposes of the constitutional prohibition against investment in private corporations. Contributions to a retirement system would seem to be a clear example of funds which are held by the state treasurer in a custodial capacity rather than as funds belonging to the State of Ohio per se. See R.C. 135.21, which distinguishes between such types of moneys for purposes of allocating the interest earned on invested public funds.

A compelling reason for reaching this conclusion may be readily discovered from an analysis of the statutes authorizing investment of the monies held by retirement boards. See R.C. 145.11 (Public Employees Retirement System), R.C. 3307.15 (State Teachers Retirement System), and R.C. 3309.15 (Public School Employees Retirement System). The funds held and invested by these boards are directly analogous to those held and invested by the Public Employees Deferred Compensation Board. Each statute authorizes investment in corporate obligations, including common and preferred stock, subject to certain limitations. If investment of Deferred Compensation Board funds in such stocks is unconstitutional, then similar investments of funds held by the other boards are also. The authority of these boards to invest in corporate stocks is unchallenged. Furthermore, enactments of the General Assembly are entitled to a presumption of constitutional validity. State, ex rel. Dickman v. Defenbacher, 164 Ohio St. 142 (1955); State, ex rel. Jackman v. Court of Common Pleas, 9 Ohio St. 2d 159, 162 (1967); State, ex rel. Lukens v. Brown, 34 Ohio St. 2d 257 (1973). Since investment in corporate stocks by other boards is presumably constitutional, such investment by the Deferred Compensation Board is also. Accordingly, I conclude that the Deferred Compensation Board, like the retirement system boards, is not prohibited by Article XIII, Section 4, Ohio Constitution, from investing funds in corporate stock.

This conclusion does not necessarily conflict with the Internal Revenue Service's requirement that deferred compensation funds remain the property of the employer (here, the state). From the employee's point of view, the funds are merely shifted from one state agency to another. They remain the funds of the state as opposed to his own funds, because he has no present right to them. Whether they are technically "state funds" for other purposes is irrelevant to this ques-

tion. However, the approval of the Internal Revenue Service should be sought, pursuant to R.C. 145.72 (A).

In specific answer to your question, it is my opinion and you are so advised that the Ohio Public Employees Deferred Compensation Board may invest money it holds for employers in the equity and debt instruments described in Chapter 145, of the Revised Code without violating Article VIII, Section 4 of the Ohio Constitution.