



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

January 16, 1959

Overruled by *C-704*

where conflict

Honorable Gordon H. Lloyd
Executive Secretary
Employees Retirement System
of Texas
Capitol Station
Austin 11, Texas

Opinion No. WW-548

Re: Whether retirement funds of the Employees Retirement System may be invested in corporation stocks and bonds other than those in which the Permanent University Fund of The University of Texas is invested.

Dear Mr. Lloyd:

Your request for an opinion is, in part, as follows:

" . . . , is the investment of Employees Retirement Funds in corporate bonds, preferred stocks and common stocks subject to the discretion of the Board of Trustees of the Employees Retirement System, within those limits set out in Section 11a of Article VII of the Constitution for guidance of the Board of Regents of the University, or may the Board of Trustees of the Employees Retirement System make such investments within its discretion, but only in the specific stocks and bonds which have been deemed proper investments for the Permanent University Fund by the Board of Regents of the University of Texas?"

When the amendment of Section 62(a) of Article XVI of the Constitution of Texas was adopted in November, 1957, the amendment of Article 6228a, V.C.S., by Acts of the 55th Legislature, Regular Session, 1957, Chapter 402, page 1208, became effective and this statute, as thereby amended, became operative on September 1, 1958.

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The pertinent portion of the constitutional amendment is as follows:

"All funds provided from the compensation of such person or by the State of Texas for such Retirement, Disability and Death Compensation Fund, as are received by the Treasury of the State of Texas, shall be invested in bonds of the United States, or in bonds issued by any agency of the United States Government, the payment of the principal of and interest on which is guaranteed by the United States; or in such other securities as are now or hereafter may be permitted by law as investments for the Permanent University Fund or for the Permanent School Fund of this State, under the same limitations and restrictions imposed by the Constitution for investment of those funds and subject to such regulations as the Legislature may provide." (Emphasis added)

The applicable provisions of the statute, as amended, appear in Section 7A thereof, as follows:

"The State Board of Trustees shall be the Trustees of the several funds as herein created by this Act and shall have full power to invest and reinvest such funds subject to the following limitations and restrictions:

"All retirement funds as are received by the Treasury of the State of Texas as deposits from contributions of employees or employer as herein provided, may be invested only in . . . ; and in securities in which the State Permanent School Fund or the Permanent University Fund of the University of Texas may be invested under present or hereafter enacted laws." (Emphasis added)

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We find no authority for the investment of the State Permanent School Fund in corporation bonds and stocks, but such investment of the Permanent University Fund of the University of Texas is permitted by Section 11a of Article VII of the Constitution of Texas, which follows:

"In addition to the bonds now enumerated in Section 11 of Article VII of the Constitution of the State of Texas, the Permanent University Fund may be invested in first lien real estate mortgage securities guaranteed in any manner in whole by the United States Government or any agency thereof and in such corporation bonds, preferred stocks and common stocks as the Board of Regents of The University of Texas may deem to be proper investments for said fund; and the interest and dividends accruing from the securities listed in Section 11 and Section 11a, except the portion thereof which is appropriated by the operation of Section 18 of Article VII for the payment of principal and interest on bonds or notes issued thereunder, shall be subject to appropriation by the Legislature to accomplish the purposes declared in Section 10 of Article VII of this Constitution. In making each and all of such investments said Board of Regents shall exercise the judgment and care under the circumstances then prevailing which men of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital; provided, however, that not more than fifty per cent (50%) of said fund shall be invested at any given time in corporate stocks and bonds, nor shall more than one per cent (1%) of said fund be invested in securities issued by any one (1) corporation, nor shall

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more than five per cent (5%) of the voting stock of any one (1) corporation be owned; and provided, further, that stocks eligible for purchase shall be restricted to stocks of companies incorporated within the United States which have paid dividends for ten (10) consecutive years or longer immediately prior to the date of purchase and which, except for bank stocks and insurance stocks, are listed upon an exchange registered with the Securities and Exchange Commission or its successors. This amendment shall be self-enacting, and shall become effective upon its adoption, provided, however, that the Legislature shall provide by law for full disclosure of all details concerning the investments in corporate stocks and bonds and other investments authorized herein." (Emphasis added)

Neither the underlined language in Section 62(a) of Article XVI of the Constitution of Texas, supra, nor that in Article 6228a, supra, is sufficient within itself to serve as a complete guide for the investment of the Employees Retirement Funds in corporation stocks or corporation bonds for both refer to and wholly depend upon what ". . . may be permitted by law as investments for the Permanent University Fund. . . ." This, in turn, is clearly set out in Section 11a of Article VII, supra, as being only "such corporation bonds, preferred stocks and common stocks as the Board of Regents of The University of Texas may deem to be proper investments for said fund." There follows a delineation of certain further limits and conditions governing such investments.

Certainly the Permanent University Fund may not be invested in any or all corporation stocks and bonds which are to be found in the market, but only in those which fall within such limits and conditions as are set out in Section 11a of Article VII, supra, and which the said Board of Regents "may deem to be proper investments for said fund." "Deem" does not signify an arbitrary exercise of will, but a deliberate exercise of judgment.

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"To deem" is to think, judge, hold as an opinion, decide or believe on consideration, to adjudge. State v. Cohen, 63 A. 928, 930, 73 N.H. 543.

Since no investment of the Permanent University Fund in corporation stocks and bonds is permitted by law unless it is deemed to be a proper investment by the Board of Regents, and since Employees Retirement funds may be invested in such corporation stocks and bonds only if they are "permitted by law" as investments for the Permanent University Fund, it follows that if the Employees Retirement funds are invested in corporation stocks and bonds, only those particular corporation stocks and bonds are eligible which are deemed to be proper by the Board of Regents of the University of Texas as investments for the Permanent University Fund. The best evidence of what these may be is the actual investment of the Permanent University Fund within the limitations of Section 11a of Article VII, supra, as shown by public records both at the University and at the office of the State Comptroller of Public Accounts.

This is not to say that when the Permanent University Fund is invested in a particular security, such security must also be purchased by the Employees Retirement funds. Purchase of that security thereby becomes permissive in respect to the Employees Retirement funds and whether or not it is actually purchased is a matter resting within the sound discretion of the State Board of Trustees of the Employees Retirement System of Texas.

Since the word "invested" contemplates not only the original purchase but the holding of a particular security as an investment, we think that if the Permanent University Fund is withdrawn from investment in a particular security the Employees Retirement funds must likewise be withdrawn within a reasonable time.

SUMMARY

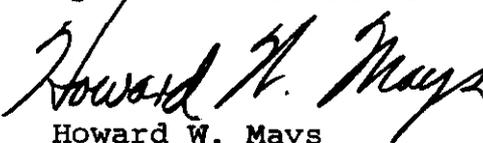
Retirement funds of the Employees Retirement System of Texas may not be invested in corporation stocks and bonds other than those in which the Permanent University Fund of The University of Texas is invested.

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Very truly yours,

WILL WILSON
Attorney General of Texas

By 
Howard W. Mays
Assistant Attorney General

HWM-s

APPROVED:

OPINION COMMITTEE

W. R. Hemphill, Chairman

Marietta Payne
Thomas Burrus
Robert T. Lewis

REVIEWED FOR THE ATTORNEY GENERAL

By: Morgan Nesbitt