

STATE RETIREMENT SYSTEM:
COMMON STOCK:
INVESTMENT FUNDS:
LIFE INSURANCE COMPANIES:
CASUALTY INSURANCE COMPANIES:

The Board of Trustees of the State Retirement System may invest the funds of the System in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

November 28, 1961

Mr. W. A. Hemphill, Secretary
Missouri State Employees' Retirement System
State Capitol Building
Jefferson City, Missouri

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Dear Mr. Hemphill:

This is in reply to your opinion request wherein you state:

"During the Board Meeting a report was made by their financial advisor on investments, as to the relative merits of initiating a common stock purchase program at this time.

"Since their report seemed favorable on this subject and before taking any action on same, the Board would like to have an opinion as to its legality."

Section 104.440(3), RSMo 1959, provides that the Board of Trustees may invest the funds of the State Retirement System in the following manner:

". . . The board may invest the funds of the system as permitted by laws of Missouri relating to the investment of capital, reserve, and surplus funds of life insurance companies or casualty companies organized under the laws of Missouri."

Section 376.305, RSMo 1959, authorizes life insurance companies in Missouri to invest in common stocks in domestic corporations. Said pertinent language is as follows:

"1. In addition to the investments permitted by section 376.300, the capital, reserve and surplus of all life insurance companies of whatever kind and character organized or doing business under sections 376.010 to 376.670, may be invested in the common stock of any solvent corporation, organized under the laws of the United States, any state, territory or possession of the United States, or the District of Columbia; . . . "

In addition, said section sets forth the qualifications necessary in order to qualify common stock for investment by life insurance companies.

Casualty insurance companies are defined by Section 379.010, RSMo 1959, and their authority to invest in common stocks of domestic corporations is granted by Section 379.080, RSMo 1959, which states, in part, as follows:

". . . and the remainder of the capital of said companies and their other assets may be invested either in the property or securities in this section above mentioned, . . . or in stocks, bonds or evidence of indebtedness issued by corporations, organized under the laws of this state, or of the United States, or of any other state . . . provided, that no such insurance company may buy stock in any company to an amount which will give the company so buying the virtual control of any other corporation, . . . and no such company shall invest more than thirty-five per cent of the surplus to policyholders of such acquiring company, or fifty per cent of its surplus over and above its liabilities and capital, whichever is greater, in the stocks or bonds of any other such corporation."

Although, by statute, both life insurance and casualty insurance companies are authorized to invest in common stock

of domestic corporations, statutory restrictions qualifying said stock are to be found only in regard to life insurance companies.

However, since both life and casualty insurance companies are authorized to invest in common stock, the Board of Trustees of the State Retirement System may invest the funds of the System in common stocks of any corporation organized under the laws of the United States, or of any state.

We feel it appropriate at this time to call your attention to the case of *Rand et al. v. McKittrick*, 142 S.W. 2d 29, in which Judge Westhues referred to the Restatement of the Law, on Trusts, and then stated at page 31, as follows:

"As to the duty of a trustee in making investments, see sec.227, page 645 of the same book, where we find the rule as follows:

'In making investments of trust funds the trustee is under a duty to the beneficiary

'(a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived'.

"This latter statement is the yardstick generally used by the courts of the union in determining the duties of a trustee. Courts following the New York rule, as well as those following the Massachusetts rule, are in perfect harmony on this question. It is also the rule in this state. See *Cornet v. Cornet*, 269 Mo. 298, 190 S. W. 333, loc.cit. 339(5).

"[1,2] An analysis of these cases will disclose that the courts of the land

have required trustees of trust funds to exercise a greater degree of care and caution when investing such funds than prudent men ordinarily exercise when investing their own funds. Investments which are speculative in nature have been universally tabooed, by the courts of the union, as proper investments for trust funds. Yet prudent men may and do invest in speculative enterprises. *Wild v. Brown*, 120 N.J.Eq. 31, 183 A. 899. Hence the rule is well stated, Restatement of the Law, on Trusts, supra, that trustees may 'make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived'. The part we have italicized is important. . . . An examination of the cases will demonstrate that trust funds, in those states where the courts, legislature, or the people by constitutional provision have prohibited the investment of trust funds in stocks, have fared no better than have the trust funds in the states following the Massachusetts rule. We think this demonstrates that the preservation of trust estates depends more upon the integrity, honesty and business acumen of the trustees than it does upon arbitrary legal classification of securities wherein trust funds may be invested. . . . "

The Court then quoted with approval from the case of *Walker v. Buhl*, 211 Mich. 124, 178 N.W. 651, 12 A.L.R. 569, as follows:

"When such a fund passes into the hands of a trustee, it becomes impressed with a double duty: First, to so invest it that it can be turned over at the expiration of the trust period without loss; and, second, to secure an income therefrom. He must act honestly and faithfully, and

in what he believes to be the best interest of the cestui que trust. He must exercise a sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters employ in their own affairs when making a permanent investment, in which the primary object is the preservation of the fund and the secondary one that of obtaining an income therefrom. He must not permit himself to take the hazard of an investment with the hope of largely increasing the fund as he might, perhaps, do in the prudent management of his own estate. The entire element of speculation must be removed. He must at all times remember that he is handling a trust fund, the care of which has been intrusted to him in reliance on his integrity, fidelity and sound business judgment."

In the absence of specific statutory restrictions on this type of investment, the Board of Trustees of the State Retirement System of Missouri, in administering and investing the funds of the system, are bound by this general law respecting trusts and trustees.

It is to be noted that our opinion holds that the Board of Trustees of the State Retirement System may invest in common stock of only corporations organized under the laws of the United States, or of any state, notwithstanding Section 376.305(1), RSMo 1959, which allows life insurance companies to also invest in common stock of certain corporations organized under the laws of a territory or possession of the United States.

The reason for the limitation in this opinion is due to the complexities in the law regarding corporations organized under the laws of territories and possessions of the United States. In addition, we deem it a remote possibility that the Board of Trustees of the State Retire-

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ment System would purchase common stock of said corporations. However, if in the future, the Board of Trustees of the State Retirement System desires to purchase common stock in said corporations, then, and in that event, this office will gladly furnish any opinion thereon.

CONCLUSION

The Board of Trustees of the State Retirement System may invest the funds of the System in common stock of any corporation organized under the laws of the United States, or of any state, subject to the prudent man rule regarding investments by trustees as expressed in Missouri court decisions.

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GWD lc