

**OPINION
64-491**

September 3, 1964 (OPINION)

Mr. Geo. M. Thompson

Investment Director

The Bank of North Dakota

RE: Workmen's Compensation - Investment of Funds - Certificates of D

This is in response to your letter in which you ask for an opinion in accordance with the following resolution passed by the Investment Board:

'Mr. Owen further moved that the Investment Board contact the Attorney General regarding the legality of continuing investments in the form of Certificates of Deposit in commercial banks of the State of North Dakota, and asked that the Workmen's Compensation Bureau be authorized to renew the Certificates of Deposit held in commercial banks of the State of North Dakota which will become due prior to September 1, 1964, at a 4 percent interest rate, unless the Attorney General should rule otherwise. Mr. Schmalenberger seconded the motion. All members voted 'Aye', and the motion carried.'

The question, in effect, is whether or not the Workmen's Compensation Bureau may use its money to acquire certificates of deposits with commercial banks of the State of North Dakota other than the Bank of North Dakota. To state the question in another way, is a certificate of deposit as referred to herein an investment or is it a deposit?

The term "deposit" has variable meanings and its true meaning can be determined only from the context in which it is used. As an example, there are general deposits, cash deposits, special deposits, time deposits, savings deposits, etc. Even the name given to the deposit is in itself uncontrolling. (See the various comments in "Words and Phrases" under DEPOSITS, Volume No. 12, and the references therein.)

As to the Workmen's Compensation Bureau, we find that its authority to invest funds was amended by section 65-04-31 of the North Dakota Century Code by the 1963 Legislature, which now provides as follows:

INVESTMENT OF FUND. Investment of the fund shall be under the supervision of the state investment board in accordance with chapter 21-10."

As to the custody of funds of the Workmen's Compensation Bureau, section 65-04-30 of the North Dakota Century Code seems to be controlling. This section provides that the State Treasurer shall be custodian of the Workmen's Compensation fund. It further provides that the Treasurer may deposit any funds not needed for immediate use in the manner and subject to the requirements prescribed by law for

the deposit by such Treasurer of State funds. It is significant to note that this section provides that any interest earned by any portion of the fund which is deposited by the State Treasurer shall be collected by him and placed to the credit of the Workmen's Compensation Bureau fund.

Legal investments under chapter 21-10 of the North Dakota Century Code are set forth in section 21-10-07. Subsection 5 thereof provides, in part, as follows:

* * * * or other investments that are issued by or fully insured or guaranteed by the United States * * * *."

Subsection 6 thereof provides that investments may be made in "Bank of North Dakota certificates of deposit; * * * *."

For the purpose of this opinion we are assuming that the deposits with other banks or the Bank of North Dakota are guaranteed by the United States through the F.D.I.C. up to \$10,000.00.

The question then must be resolved on the proposition - is a certificate of deposit an investment or is it a deposit? Whether a deposit is an investment or a mere placing of funds in the bank for safekeeping is dependent upon the nature of the transaction. One of the distinguishing features is that a deposit which is subject to call by the depositor at any time is generally held to be a placing of funds for safekeeping rather than an investment. However, where funds are deposited for a fixed period of time and interest is paid thereon, such deposit is considered an investment. (Brooke v. White, 258 N.W. 766).

The Court in Board of School District v. Cook County, 191 N.E.2d., 444, on the topic in question said:

Distinction between deposit and investment is not always too clear. Generally in terms of money a deposit is the placing of money in a bank for safekeeping; and investment is the placing of money in some form of property for income or profit."

The Court then recognized the two lines of decision - one holding that deposits in banks are investments and that deposits in banks are not investments. This question has been resolved in this state in Kilby v. Bernham, 65 N.D. 169, wherein the Court said:

The placing of money in the bank on time certificates was not a mere deposit pending investment but was in itself an investment."

The question before the Court in this instance was whether or not a guardian should be held personally liable for the money deposited with a bank which failed. If it was a deposit he would not be personally liable but if such act was an investment he would be personally liable. The guardian had placed money in the bank on time deposits bearing interest. The Court held that the placing of money on time deposit which bore interest was an investment not a mere deposit.

This case takes on specific significance when it is recognized that the court here imposed personal liability on a transaction which had been classified by other jurisdictions as a deposit and not as an investment. This would indicate that for our purposes a deposit bearing interest and which may not be withdrawn at will is in fact an investment.

Actually the mere fact that section 21-10-07 of the North Dakota Century Code mentions certificates of deposit with the Bank of North Dakota as an authorized investment is almost conclusive that certificates of deposit are considered investments. It might be suggested that the specific mention of the Bank of North Dakota is to the exclusion of all other banks but the language under subsection 5 permits other investments which include investments in other banks if same are guaranteed by the United States Government, or an instrumentality thereof.

From the language contained in the resolution, for example, "certificates of Deposit" * * * * "will become due prior to September 1, 1964, at a 4 percent interest rate" * * * * "and" * * * * "intend to renew" * * * * "unless the Attorney General should rule otherwise." - leaves the unmistakable conclusion that the certificates referred to therein are actually time deposit certificates. For the purpose of this opinion we are assuming that the certificates are time deposit certificates.

Earlier we mentioned section 65-04-30 of the North Dakota Century Code, which provides that the State Treasurer be custodian of the Workmen's Compensation Bureau funds, and that the unused portion thereof be deposited in accordance with law. Section 6-09-07 of the North Dakota Century Code provides where such money shall be deposited and is as follows:

All state funds, and funds of all state penal, educational and industrial institutions shall be deposited in the Bank of North Dakota by the persons having control of such funds."

We are satisfied that the statutory provision here refers to funds which are not being invested. We cannot construe this section to mean that any department is prohibited from investing its funds. Chapter 21-10 of the North Dakota Century Code provides to the contrary.

It is therefore our opinion that time certificates of deposit are an investment and as such the funds of the Workmen's Compensation Bureau may be invested in such certificates of deposit, if such certificates of deposit are, in fact, time certificates of deposit and bear interest.

HELGI JOHANNESON

Attorney General