



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 12, 1983

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 83- 135

The Honorable Billy Q. McCray
State Senator, Twenty-Ninth District
1532 North Ash Street
Wichita, Kansas 67214

The Honorable Norman E. Justice
State Representative, Thirty-Fourth District
506 Washington Blvd.
Kansas City, Kansas 66101

Re: State Departments; Public Officers and Employees--
State Moneys--Investments; Civil Rights

State Boards, Commissions and Authorities--Public
Employees Retirement Systems--Investments; Civil
Rights

Synopsis: Neither the Kansas Constitution nor current statutes preclude investments by the Kansas Public Employees Retirement System or the State Pooled Money Investment Board in banks or corporations doing business with, or having investments in, the country of South Africa. Until both the Kansas legislature and the governor approve legislation to limit such investments, these public agencies are free to make otherwise prudent investments. Cited herein: K.S.A. 17-5004, 44-1001, 44-1002, 44-1009, 44-1015, 44-1016, 44-1017, 44-1027, 74-4901, K.S.A. 1982 Supp. 74-4909, K.S.A. 74-4921, K.S.A. 1982 Supp. 75-4221a, K.S.A. 75-4254, 1982 Senate Resolution No. 1874, 1983 House Resolution No. 6056, 1983 House Resolution No. 6055, Kan. Const., Art. 2, §20, U.S. Const., Art. VI, Cl. 2.

*

*

*

The Honorable Billy Q. McCray
The Honorable Norman E. Justice
Page Two

Dear Senator McCray and Representative Justice:

You both have submitted opinion requests to this office concerning current investment practices of certain state agencies. As your separate inquiries are similar in nature, we address your questions in one opinion.

Specifically, you ask whether the investment practices of the Pooled Money Investment Board (PMIB) (K.S.A. 1982 Supp. 75-4221a et seq.) and the Kansas Public Employees Retirement System (KPERs) (K.S.A. 74-4901 et seq.), violate the Kansas Constitution or Kansas statutes.

You have advised that moneys controlled by these state agencies are being invested in banks or corporations that invest in or trade with South Africa, a country which currently is undergoing substantial public criticism in the United States for its policy of apartheid. From an Afrikaner word meaning "separateness," apartheid has been the law of South Africa since 1948, although its historical antecedents go back to the 17th century, when the area was first settled by colonists from the Netherlands. These settlers, or Boers, as they called themselves, based their domination of the native Hottentots and the Bantu to the north on principles they believed to be found in the Bible. Although restrained by the British during the period from 1815 to 1908, the Boers gradually extended their beliefs into government policy from that time on, with the definitive break coming in 1948, with the Nationalist Party's electoral victory over the more moderate and pro-British elements. Since that time, apartheid has been criticized by the nations and peoples of the world.

While we intend to opine on the legality of such investments, we do not express any opinion as to the existence of such investments or their scope.

Both the KPERs and the PMIB are endowed with broad investment powers (see K.S.A. 1982 Supp. 74-4909 and K.S.A. 75-4254) and we note that there is but one significant statutory restriction placed upon these organizations as to investments; that being the investment of these moneys in a responsible and prudent manner. This standard is specifically outlined for the KPERs as follows:

"In investing and reinvesting moneys in the fund and in acquiring, retaining, managing and disposing of investments

The Honorable Billy Q. McCray
The Honorable Norman E. Justice
Page Three

of the funds there shall be exercised the judgment and care under the circumstances then prevailing, which men of 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 these funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard . . . , there may be acquired, retained, managed and disposed of as investments of the fund, every kind of investment which men of prudence, discretion and intelligence acquire, retain, manage and dispose of for their own account." K.S.A. 74-4921(4) (a). See also K.S.A. 17-5004.

We cannot conclude, as a matter of law, that the investment practices of the state agencies herein concerned violate the above standard. Nor are we aware of any Kansas constitutional provision or statute which prohibits the investments you question. Specifically, we have been asked whether the Kansas Acts Against Discrimination, K.S.A. 44-1001 et seq., are applicable in such instances. The laws apply only to acts discriminating against people, persons or citizens in this state (see e.g. K.S.A. 44-1001), and we can find no authority for the proposition that these investment practices discriminate directly against any "person" in Kansas as that term is defined in K.S.A. 44-1002. Note further the scope of prohibited practices contained K.S.A. 44-1009, 44-1015, 44-1016, 44-1017, 44-1027. Likewise, we know of no federal law or provision of the U.S. Constitution which would preclude the investment practices to which you refer.

Our research has disclosed that currently 23 states and several cities are considering enacting disinvestment statutes as a public response to South Africa's domestic racial policies. To date however, we have found only four states which have enacted any specific legislation concerning state moneys: Massachusetts, Michigan, Connecticut, and Wisconsin. We know of no court rulings on the constitutionality of such statutes, although the Wisconsin Attorney General and the Washington, D.C. Corporation Commission have opined that these statutes are not unconstitutional under Article VI, Clause 2 of U.S. Constitution, commonly known as the Supremacy Clause. (See 1978 Opinions of the Attorney General of Wisconsin, p. 21.)

The Honorable Billy Q. McCray
The Honorable Norman E. Justice
Page Four

Although 1982 Senate Resolution No. 1874 and 1983 House Resolution No. 6056 declare it to be the policy of the separate houses of the Kansas legislature that such investment practices are against public policy, such resolutions do not have the full force and effect of law. See Kan. Const., Art. 2 §20. Unless and until the Kansas legislature enacts, and the governor signs into law, a measure precluding such investments in businesses connected with South Africa, the PMIB and the KPERS are free to invest in any otherwise legal and prudent manner.

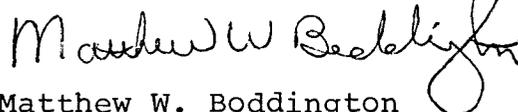
We note in passing that a similar resolution (1983 House Resolution No. 6055) was passed by the Kansas House concerning investments of these two state agencies in the banks or corporations doing business with the country of Poland. This resolution may be viewed as having the same legal significance as the two South Africa resolutions herein discussed.

Therefore, it is the opinion of this office that neither the Kansas Constitution nor current statutory law preclude investments by the Kansas Public Employees Retirement System or the State Pooled Money Investment Board in banks or corporations doing business with, or having investments in, the country of South Africa. Until both the Kansas legislature and the governor endorse legislation to limit such investments, such public agencies are free to make otherwise prudent investments.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Matthew W. Boddington
Assistant Attorney General

RTS:BJS:MWB:jm