

February 29, 2008 State Unemployment Trust Fund

Betty Sparrow Doris, Cabinet Secretary
Department of Workforce Solutions
401 Broadway NE
Albuquerque, NM 87103

Gary Bland, State Investment Officer
State Investment Office
2055 S. Pacheco St.
Santa Fe, NM 87505

Re: Opinion Request - State Unemployment Trust Fund

Dear Secretary Doris and Mr. Bland:

The State Investment Office ("SIO") and Department of Workforce Solutions ("Department") have jointly requested our opinion regarding the appropriate investment requirements for the State Unemployment Trust Fund ("Fund"). In 2007, the legislature created the Fund and stated: "[m]oney in the fund shall be invested by the state investment officer as land grant permanent funds are invested pursuant to Chapter 6, Article 8 NMSA 1978." NMSA 1978, § 51-1-19.1(A) (2007). The land grant permanent fund, also known as the Permanent School Fund, is a constitutionally created fund with specific enumerated requirements. See N.M. Const. art. XII, § 7(D). It is our understanding that the SIO is currently investing the Fund in accordance with the requirements for the land grant permanent fund.

Based on our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude the SIO should continue to invest the Fund pursuant to the investment requirements of Article XII, Section 7.

The requirements in Article XII, Section 7(D) provide that:

- (1) not more than sixty-five percent of the book value of the fund shall be invested at any given time in corporate stocks;
- (2) not more than ten percent of the voting stock of a corporation shall be held;
- (3) stocks eligible for purchase shall be restricted to those stocks of businesses listed upon a national stock exchange or included in a nationally recognized list of stocks; and
- (4) not more than fifteen percent of the book value of the fund may be invested in international securities at any single time.

NMSA 1978, Chapter 6, Article 8 authorizes the SIO, in conjunction with the State Investment Council, to establish investment policies to implement these requirements. See NMSA 1978, § 6-8-7(A) (2005). The investment policies set annual numeric allocation targets, caps and ranges. The SIO and Department have a difference of opinion concerning the appropriate investment requirements for the Fund. The SIO contends that the language of Section 51-1-19.1(A) should be interpreted to mean that the SIO should invest the Fund in accordance with the land grant permanent fund requirements. The law reads that the Fund must be invested “as land grant permanent funds are invested.” The SIO also notes in the request letter that the legislature has created four funds within the last several years, using identical language to Section 51-1-19.1(A), and the SIO has invested, or plans to invest, all of them according to land grant permanent fund requirements. See Handicapped Housing Modification Permanent Fund, NMSA 1978, § 28-10-5.1(A) (amended through 2007); Tribal Infrastructure Trust Fund; NMSA 1978, § 9-21-22(A) (2005); Tobacco Settlement Permanent Fund, NMSA 1978, § 6-4-9(A) (amended through 2003); and Water Trust Fund, NMSA 1978, § 72-4A-8(A) (2001).

The Department contends that the Fund should not be subject to the land grant permanent fund requirements. [1] It asserts that the reference in Section 51-1-19.1(A) to “Chapter 6, Article 8” is not to the process explained in Section 6-8-7(A), but to a process explained in Section 6-8-7(E). Subsection (E) reads: “Notwithstanding any statutory provision governing state agency investments, the state investment officer may invest funds available ... pursuant to a joint powers agreement in any type of investment permitted for the land grant permanent funds under the prudent investor rule.” NMSA 1978, § 6-8-7(E) (2005). The Department’s argument is that other state agencies are permitted to enter into joint power agreements with the SIO and use the SIO as their investment manager for their budgetary funds. The SIO is then permitted to invest these monies (a/k/a “client funds”) in any type of investment vehicle that is permitted for land grant permanent funds. More importantly, according to the request letter, these “client funds may exceed the policy and allocation limits [for the land grant permanent fund] set by the SIC because the client funds are invested by the SIO at the discretion/direction of the client.” The Department also argues that the use of the phrase “notwithstanding” in the beginning of subsection (E) means that subsection may trump any limiting language found in Section 51-1-19.1

We agree with the SIO’s position based on three canons of statutory construction. First, a statute should be read according to its plain, written meaning. See Wilson v Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). Section 51-1-19.1 plainly states the Fund should be invested “as land grant permanent funds are invested.” Second, the legislature could have, but did not, treat the Fund like a general appropriation to a state agency. Instead, it created a “Fund” with a specific reference to the land grant permanent fund investment requirements. See Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971) (when the legislature expressly authorizes a certain act to be done in a prescribed manner, it is limited to be done in that manner and all other modes are excluded). Finally, a specific statute, such as Section 51-1-19.1, generally trumps a general statute, such as Section 6-8-7(E). See Cordova v. Taos Ski Valley,

Inc., 121 N.M. 258, 265, 910 P.2d 334 (Ct. App. 1995). Therefore, we conclude the SIO may continue to invest the Fund pursuant to the investment requirements of Article XII, Section 7.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The Department is apparently interested in this issue because the law provides that the "earnings from the investment of the fund are subject to appropriation by the legislature to the department solely for the purpose of administering the unemployment insurance and employment security programs." NMSA 1978, § 51-1-19.1(C) (2007).