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BANK MESSENGER AGENCY—PUBLIC FUNDS—MAY LAWFULLY BE EXPENDED TO PAY FOR SERVICES, BANK MESSENGER AGENCY TO TRANSPORT COUNTY MONEYS FROM OFFICE OF COUNTY TREASURER TO DEPOSITORIES—CONTRACT BETWEEN AGENCY AND COUNTY COMMISSIONERS—OAG 1938, OPINION 3093, PAGE 1894, APPROVED; OAG 1941, OPINION 3507, PAGE 94, OVERRULED.

SYLLABUS:

Public funds may lawfully be expended to pay for the services of a bank messenger agency in transporting county moneys from the office of the county treasurer to authorized depositories under and pursuant to a contract between such agency and the county commissioners. Opinion No. 3093, Opinions of the Attorney General for 1938, page 1894, approved and followed; Opinion No. 3507, Opinions of the Attorney General for 1941, page 94, overruled.

Columbus, Ohio, September 24, 1954

Hon. Frank H. Kearns, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir :

Your request for my opinion reads in part as follows :

“I have received a request from Newton A. Thatcher, County Treasurer, as follows :

‘For several years, the Treasurer of Franklin County has used an Armored car service to transport cash and checks between the Treasurer’s office and various banks. This service has been provided by the Brink’s Express Company under terms of a contract signed by them and the Franklin County Commissioners.

‘Some question has arisen among various County Treasurers as to whether it is legal for the Treasurers to transport funds in this manner and for the county to pay the cost of such a contract. The reason for the discussion is a confusion created by the existence of two or more opinions of the Ohio Attorney General.

‘One of the opinions referred to was No. 3093 in the year 1938. This opinion definitely rules that such contracts are legal. In opinion No. 3507 of 1941 a contrary ruling was made.

‘Under modern day conditions, armored car transportation of money is an absolute essential to safe keeping of funds handled by the County Treasurer. Without such protection it would be necessary to employ additional county guards and to provide county vehicles equipped for protected transportation.

‘Will you please request the Attorney General to provide a ruling which will clarify the conflict created by the two opinions above mentioned and any others which may be involved so that we and other County Treasurers may be properly guided in the matter of transporting funds to and from depositories.’

“Finding an apparent conflict between the two opinions of the Attorney General referred to in the above letter, I request your opinion and answer to the following question :

‘Can public funds be lawfully expended to pay for the services of a bank messenger agency in transporting county monies from the County Treasurer’s Office to various banks under and pursuant to a contract between such an agency and the County Commissioners?’ * * *

"In opinion No. 3093 rendered in 1938, the Attorney General held that such funds could be expended for such purpose under authority of Section 2638-1 G.C., which provided that upon request of the County Treasurer, the County Commissioners may authorize the Treasurer to procure insurance against loss of funds and securities, in the custody of the County Treasurer, by burglary, robbery, etc.

"In opinion No. 3507 rendered in 1941, the Attorney General, interpreting the same section and other sections of the General Code relating to County Treasurers, came to the opposite conclusion.

"It is to be noted that the present statute, Section 131.11, R.C., extends the right of insurance coverage over funds and securities in transit but does not expressly authorize the use of the County funds to pay the costs of transportation of County monies from the Treasurer's Office to a public depository."

It is apparent from an examination of the 1938 and 1941 opinions referred to in your letter that the two opinions are irreconcilable. It would be well, therefore, to briefly review the opinions of this office relative to the expenditure of public funds for the security or protection of moneys in the county treasury or in transit from that office, and to note the statutory changes made following the rendition of such opinions.

In Opinion No. 527, Opinions of the Attorney General for 1927, page 874, it was held that the county commissioners had no authority to purchase or pay for burglary or holdup insurance for the county treasurer. The then Attorney General cited the case of *State, ex rel, Locher v. Menning*, 95 Ohio St., 97, to the effect that authority to act in financial transactions must be clear and distinctly granted and stated:

" * * * Inasmuch as the county itself incurs no risk if the county commissioners as their duty requires, have received from the treasurer a proper and sufficient bond to cover the liability of such treasurer, it would clearly follow that unless they were specifically authorized so to do, which they are not, they could not expend county funds for the protection of the treasurer against possible loss to him.

"It is the duty of the county commissioners to protect the county by securing this bond from the treasurer, but the treasurer himself, if he feels the necessity therefor, may take such means as he thinks proper to protect himself against the dangers incident to possible forgery or burglary."

The effect of such holding was nullified by the passage in 1929 of Section 2638-1, General Code, which provided that the county commis-

sioners "may authorize the county treasurer to procure insurance against any loss of any public funds or securities, in the custody of the county treasurer, by burglary or robbery."

In Opinion No. 3093, Opinions of the Attorney General for 1938, page 1894, it was held:

"County funds may be expended to pay a so-called bank messenger agency for transporting county monies in an armored car from the county treasurer's office to a depository bank under a contract providing that the county treasurer shall be indemnified against loss by theft, embezzlement or otherwise."

The then Attorney General called attention to the passage of Section 2638-1 authorizing the procuring of burglary and robbery insurance and concluded that since the contract with the so-called bank messenger provided indemnity against loss by theft, embezzlement, etc., such would be authorized under the provisions of Section 2638-1. He also concluded that "since the treasurer is charged by law with the care and keeping of funds in his custody, the power to pay expenses incurred in transporting these funds is necessarily implied."

In Opinion No. 3507, Opinions of the Attorney General for 1941, page 94, it was held:

"Moneys may not be legally expended from the county treasury for the payment of insurance and transportation of moneys received by a * * * county treasurer to and from a duly designated depository."

The 1941 opinion made no reference to the 1938 opinion. Reference was made to the 1927 opinion which held that the county commissioners had no authority to provide burglary insurance for the county treasurer. The passage of Section 2638-1 in 1929 was referred to but no further discussion was had as to the effect of this section. In view of the fact that the then Attorney General held not only that payment for transportation of moneys was not authorized, but also held that payment of insurance for moneys in transit was not authorized, it necessarily would appear that he was of the opinion that Section 2638-1 had no application to money in transit from the county treasury to an authorized depository.

The 1941 opinion was rendered on March 1, 1941. On May 13, 1941 the 94th General Assembly enacted House Bill No. 89 amending

Section 2288-1c, General Code, and repealing Section 2638-1, General Code. As amended, Section 2288-1c read in part as follows:

“* * * Any funds or securities in the possession or custody of any county official in his official capacity or any funds or securities the possession or custody of which is charged to any county official, *including funds or securities in transit to or from any bank or trust company*, may be insured by the county commissioners in such amount as may be found necessary in the public interest. All costs of such insurance shall be paid by the county as provided in Section 2460 of the General Code.”

(Emphasis added.)

Thus, any doubt as to the power of the county commissioners to provide for or authorize insurance for moneys in transit which might have existed under former Section 2638-1, General Code, was removed by the act of 1941 and it is clear that since that time specific statutory authority has existed for the payment of such insurance. Section 2288-1c, General Code, has now been recodified as Section 131.11, Revised Code.

This statutory provision makes it quite clear that the legislature regards the protection of county funds in transit as being in the public interest and as an objective which justifies the expenditure of public funds in achieving it. It is true that the statute speaks of only one means of protection, i.e., insurance; but this provision effectively negatives the view expressed in the Locher case, *supra*, that the public had no interest in the protection of funds in transit since the treasurer's bond fully protected the public.

In this situation, with protection of funds in transit being recognized as a matter which justifies public expense in its attainment, we may well inquire whether any reasonable and convenient means of achieving such protection at public expense is not impliedly authorized by the statute.

It is my understanding that the messenger service contract with Brinks Express Company includes a provision by which the county is indemnified against loss by theft, etc., occurring while such money is in transit. I am in agreement with the rationale of the 1938 opinion that the authority to insure against such loss implies the authority to pay incidental transportation fees of such a bailment indemnity contract, even though such contract is not, strictly speaking, one of insurance. Furthermore, I am in agreement with the conclusion expressed in the 1938 opinion that since the treasurer is charged by law with the care and keeping

of funds in his custody, the power to pay expenses incurred in transporting these funds is necessarily implied. To the extent that the 1941 opinion holds to the contrary, I hereby overrule the same. It seems to me that the rationale of the 1941 opinion would lead to the absurd conclusion that even the expenditure of county funds for a safe, a lock on the treasurer's door, etc., would be an illegal expenditure since in any event the treasurer is bound to personally account for all of such county funds.

In specific answer to your question it is my opinion that public funds may lawfully be expended to pay for the services of a bank messenger agency in transporting county moneys from the office of the county treasurer to authorized depositories under and pursuant to a contract between such agency and the county commissioners. Opinion No. 3093, Opinions of the Attorney General for 1938, page 1894, approved and followed; Opinion No. 3507, Opinions of the Attorney General for 1941, page 94, overruled.

Respectfully,

C. WILLIAM O'NEILL
Attorney General