

Note from the Attorney General's Office:

1958 Op. Att'y Gen. No. 58-1899 was overruled in part by 1960 Op. Att'y Gen. No. 60-1202.

1899

FUNDS, PUBLIC—DEPOSIT—TO BE PLACED IN ACTIVE DEPOSITORIES—AWARD OF ACTIVE DEPOSITORIES—BOARD OF COUNTY COMMISSIONERS—EXHAUSTION OF DEPOSITORIES FOR SURPLUS FUNDS BEFORE INVESTMENT IN SECURITIES CAN BE MADE—§135.12 R.C.

SYLLABUS:

1. A board of county commissioners may determine that all of the funds arising from a county hospital addition bond issue be placed in active depositories.
2. If there is in the treasury of the county a sum of money in addition to the amount for which depositories have already been provided, and the board of county commissioners desires to place the same in an active depository, it may receive new applications from qualified financial institutions, including those to whom active deposits have already been awarded.
3. Until the board of county commissioners has exhausted the possibility of obtaining depositories for surplus funds in its hands, it is without authority to invest the same in securities, as provided in Section 135.12, Revised Code.

Columbus, Ohio, March 31, 1958

Hon. Richard F. Liggett, Prosecuting Attorney
Brown County, Georgetown, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“I would appreciate your informal opinion upon the following:

“As a result of the Brown County Hospital Addition Bond Issue the county commissioners now have the sum of \$265,000.00, plus premium and accrued interest in the sum of about \$5,000.00. Bids have not yet been received for the construction of the hospital addition, and most of the money will not be needed for the construction for several months.

“On November 19, 1956 the county commissioners by resolution estimated that they would have \$100,000.00 in public funds for deposit as inactive deposits and \$350,000.00 for deposit as active deposits for a two year period commencing January 1, 1957. All eligible banking institutions in the county made application

for designation as depositories of inactive deposits and were awarded such amounts of inactive deposits in accordance with the estimate and their respective capital funds. Only two banking institutions are located in the county seat and both are eligible as depositories for active funds of the county in accordance with Section 135.04 of the Ohio Revised Code. Both banks made application for active funds of the county, one for \$150,000.00, the other for \$200,000.00.

“At the present time due to tax collections the county has on inactive deposit in the banks designated the full amount of the estimated \$100,000.00. There is on active deposit in the two eligible depositories designated approximately \$250,000.00, leaving a difference of only about \$100,000.00 before the amount estimated by the county commissioners to be on deposit and amount applied for by the depositories is reached.

“Section 135.10 of the Ohio Revised Code provides that no public depository shall be required to take or permitted to receive and have at any one time a greater amount of active deposits than that specified in the application of such depositories. Section 135.12 of the Ohio Revised Code provides for the determination of excess deposits the designation of additional depositories and the investment in obligations of the United States and Ohio. The county commissioners would like to designate the entire amount of bond issue as active funds withdrawable on demand as provided in Section 135.01 of the Ohio Revised Code. The two active depositories in the county seat would like to file additional applications for the entire amount of the funds and have the entire amount deposited with them. The county treasurer would like to have the county purchase 91 day United States Treasury notes with most of the funds.

“My questions are as follows:

1. Can the Board of County Commissioners declare all of the funds arising from a county hospital addition bond issue to be active deposits.
2. May the only two institutions eligible to receive active deposits of the county now make new applications for designation as depositories for active funds for the remainder of the period of designation in order to have deposited therein the increased amount of active deposits.
3. Must the funds of the county be deposited upon inactive and active accounts to the fullest amount designated by the application of the depositories and the estimates of the commissioners (in this case \$100,000.00 and \$350,000.00 respectively) before government obligations may be purchased?”

The provisions as to deposits of public moneys are found in Chapter 135., Revised Code. Section 135.01, Revised Code, defines "public moneys" as meaning "all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody of the treasurer of state, or the treasury of any subdivision." By the same section "active deposit" is defined as "a public deposit payable or withdrawable in whole or in part on demand."

Section 135.04, Revised Code, provides in effect that any national bank located in this state, and any bank subject to inspection by the division of banks, and any title guaranty and trust company subject to inspection by the auditor of state, are eligible to become public depositories. The amount that may be deposited in any depository is limited, as to *inactive* deposits, to an aggregate amount not in excess of the greater of (a) its capital funds, (b) thirty percent of the average of its total deposits. Active deposits are expressly excluded from this limitation.

Sections 135.07, 135.08, and 135.09, Revised Code, require each governing board of a subdivision biennially to estimate the aggregate maximum amount of public funds to be deposited as inactive deposits. After due advertisement of such action and receipt of applications, such governing board is required to make the award to the eligible institutions which offer to pay the highest rate of interest.

The application of the bidder must state the maximum amount which the applicant is willing to receive. The same section provides that "this section does not require *or permit* any public depository to receive and have at any one time a greater amount of public moneys than that specified *in the application of such depository.*"

Section 135.10, Revised Code, provides for the selection in similar manner of depositories for the active funds of the subdivision. This section provides: "*If desired*, such application *may specify* the maximum amount of such public moneys which the applicant desires to receive and have on deposit at any one time during the period covered by the designation." It is also provided in this section:

"* * * no such public depository shall thereby be required to take *or permitted to receive* and have at any one time a greater amount of active deposits of such public moneys than that specified in the application of such depository; and if, by reason of said limitation or otherwise, the amount of active public moneys deposited or to be deposited in a public depository, pursuant to

an award made under this section, is reduced or withdrawn, as the case requires, the amount of such reduction or the sum so withdrawn shall be deposited *in another eligible institution applying therefor, or if there is no such eligible institution*, then the amount so withheld or withdrawn shall be awarded or deposited for the remainder of the period of designation in accordance with sections 135.01 to 135.23, inclusive, of the Revised Code.” (Emphasis added)

It will be noted that the obligation to employ “another eligible institution” is limited to a case where the board is authorized to “reduce or withdraw,” presumably for failure of the depository to maintain its eligibility. These limitations as to the amount which a depository may have at any one time, are unquestionably based on the fact that with each selection of a depository, securities have to be furnished by the depository as required by Section 135.16, Revised Code, covering the amount of its deposits. This procedure, under the provision of Section 135.13, Revised Code, results in a definite contract.

This analysis brings us to the situation presented by your communication where, as I understand it, the full amount applied for and awarded to *inactive* depositories is in their hands; and the *active* depositories have received all but \$100,000.00 of their allotment. But the county has on hand surplus funds which would more than fill the total amount awarded to the active depositories and which either must go into supplementary depositories or if permitted by the law, be invested in United States or Ohio securities. I assume from your letter that the two active depositories in the county would be qualified for additional deposits if they can legally be awarded to them.

It seems very clear that the county commissioners have the authority to decide whether these additional funds should be treated as active or inactive funds. It appears to me that we may look to Section 135.12, Revised Code, for the real answers to the questions which you have submitted. That section provides in part as follows:

“Whenever, during a period of designation, the amount of the public moneys of the state or of a subdivision is in excess of the aggregate amount of *inactive and active deposits as estimated* by the proper governing board prior to the beginning of the period of designation, and the board finds that all or part of such excess should be deposited as inactive deposits and that such excess cannot be so deposited in existing depositories of the inactive funds of the state or the subdivision because of the limi-

tations of sections 135.01 to 135.23, inclusive, of the Revised Code, the board shall meet and designate *additional public depositories* of the inactive deposits of public moneys subject to its control for a period commencing on a specified date and ending on the date of the expiration of the current period of designation. Sections 135.07, 135.08, and 135.09 of the Revised Code shall be complied with in awarding and maintaining inactive deposits for such period.

“If such portion of such excess amount as the board finds *should not be deposited as inactive deposits is*, when added to the amount of active deposits of the state or subdivision which the board estimates to be deposited or subject to deposit during the remainder of the period of designation, *greater than the aggregate amount of active deposits* of such public moneys, *applied for by the existing depositories thereof*, the board shall at such meeting, *award the active deposits of the public moneys subject to its control to public depositories thereof for a like period*. Sections 135.07 and 135.10 of the Revised Code shall be complied with in awarding and maintaining active deposits for such period.

“If, after compliance with sections 135.01 to 135.23, inclusive, of the Revised Code, requiring the deposit of public moneys in public depositories, the amount of public moneys of the state or of a subdivision *is in excess of the aggregate amount of such deposits*, and the board finds that *such excess cannot be deposited in public depositories because of the limitations of such sections*, *such board may order the treasurer to invest* any part of such excess in bonds, notes, certificates of indebtedness, treasury bills, or other securities, issued by and constituting direct obligations of the United States, or obligations of the state of Ohio issued pursuant to the authority of Section 2e, Article VIII, Ohio Constitution, provided that only such obligations as will mature or are redeemable at the option of the holder within two years from the date of purchase shall be eligible securities for such investments. Any order of the board directing the treasurer to invest public moneys shall specifically state the amount of public moneys to be invested and shall specifically describe the securities to be acquired. * * *” (Emphasis added)

Here it will be noted that if the board determines that a portion or all of these excess funds should be put in either active or inactive deposit, it may award them to additional public depositories by complying with the statutes to which I have referred. While Section 135.10, *supra*, does provide that no depository of active funds should be permitted to receive more than the amount stated in his application, that limitation plainly applies only to an existing contract, and I do not perceive any reason why the board, in calling for new applications for the surplus funds, could

not receive new applications for these additional funds from the same institutions, provided they have the qualifications prescribed by law. This would result in new supplemental contracts being made with new security, as provided by the law.

As to the investment of these surplus funds, it seems clear from the provision of Section 135.12, Revised Code, which I have just quoted, that until the board has exhausted its efforts to secure additional depositories, it has no authority to invest its excess funds in any manner. I call especial attention to that paragraph of said Section 135.12, *supra*, which furnishes the only authority for investment of funds:

“If * * * the amount of public money of * * * a subdivision is in excess of the aggregate amount of such deposits, and the board finds that such excess cannot be deposited in public depositories because of the limitations of such sections, such board may order the treasurer to invest * * *.”

Accordingly, and in specific answer to your question, it is my opinion:

1. A board of county commissioners may determine that all of the funds arising from a county hospital addition bond issue be placed in active depositories.
2. If there is in the treasury of the county a sum of money in addition to the amount for which depositories have already been provided, and the board of county commissioners desires to place the same in an active depository, it may receive new applications from qualified financial institutions, including those to whom active deposits have already been awarded.
3. Until the board of county commissioners has exhausted the possibility of obtaining depositories for surplus funds in its hands, it is without authority to invest the same in securities, as provided in Section 135.12, Revised Code.

Respectfully,

WILLIAM SAXBE
Attorney General