

139.

APPROVAL, BONDS OF GRAND TOWNSHIP, MARION COUNTY—\$9,865.78.

COLUMBUS, OHIO, March 2, 1929.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

140.

STATE FUNDS—UNDER CONTROL OF STATE TREASURER—WHERE DEPOSITED—WHAT BANKS AND TRUST COMPANIES ELIGIBLE.

**SYLLABUS:**

*There is no authority for the Treasurer of State to deposit state funds in any bank or trust company other than those banks and trust companies which have been duly approved by the State Board of Deposit and have regularly made application for and duly submitted bids for the receipt of state funds as public depositories.*

COLUMBUS, OHIO, March 2, 1929.

HON. H. ROSS AKE, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion as follows:

“Referring to the report of the examination by the Department of Auditor of State, made of the Ohio State Treasury for the period ending February 5, 1929, I direct your attention to pages twelve and thirteen of said report, containing the following statement, in which the question of the legality of depositing funds of the State of Ohio is apparently raised.

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‘A check of the records in the office of the Treasurer of State shows that on the date of this examination, February 5, 1929, moneys had been deposited in eleven banks (included above) to the amount of \$1,135,000.00 which banks were not, at the time, regularly qualified depository banks approved by the State Board of Deposits. Said banks are as follows:

*Banks Receiving Money Without Bids*

4%	The State Bank, Bowling Green.....	\$50,000
4%	First National Bank, Brookville.....	25,000
4%	City National Bank, Dayton.....	100,000
4%	City National Bank & Trust Co., Dayton.....	100,000
4%	Dayton Savings & Trust Co., Dayton.....	200,000
4%	Merch. National Bank & Trust Co., Dayton.....	200,000
4%	Third National Bank & Trust Co., Dayton.....	100,000
4%	Perrysburg Bank Co., Perrysburg.....	25,000
4.6%	First National Bank, Powhatan Point.....	10,000
3.75%	Com. Guard Trust & Sav. Bank, Toledo.....	300,000
4%	Walbridge State Bank, Walbridge.....	(10,000)
		(15,000)
		<hr/>
		\$1,135,000

The records of the State Board of Deposits do not show any applications or bids as being filed by said banks and endorsed thereon as "approved" and signed by each member of the board of deposits, or a majority thereof, as Sec. 325, G. C., requires in the selection of bank depositories for state funds.

Said banks are of unquestioned financial standing. Treasurer Buckley secured a rate of interest as high, or higher, than the prevailing rate and he required of each bank to furnish—and they did furnish—the security required by law. He claimed the authority to make such deposits under the provisions of Sec. 330, G. C., governing the placing of additional state funds. However, we do not believe the provisions of the law governing the deposits of state funds have been strictly followed in this instance.'

The treasury department would like to be advised as to whether or not the deposits therein enumerated have been legally placed, and if the above listed depositors have not been legally designated, what action your department would advise the treasury department to take in the premise."

A depository of public funds has been defined as a person designated by law to whom public officials may or shall confine the custody of public funds.

Prior to the enactment of the depository law hereinafter referred to, it was, according to law, a conversion and embezzlement for a state treasurer to take any money from the treasury and deposit it in any bank. Bates Revised Statutes, Section 6841; *State vs. Surety Company*, 21 O. D. 571; *Surety Company vs. Crafts*, 240 Federal, page 1.

In 1904 the Legislature of Ohio passed an act entitled "An Act to provide a depository for state funds." This depository law after several subsequent amendments is now found in Section 321 et seq. of the General Code of Ohio.

By the terms of Section 321, General Code, there is created what is known as a State Board of Deposit, consisting of the Treasurer of State, Director of Finance and the Attorney General, the Treasurer of State to be the chairman of said board. It is the duty of said board to meet on the first Monday in April in each odd numbered year, or as often as is necessary at the call of the chairman, and to designate such national banks within the State, and banks and trust companies doing business within this State and incorporated under the laws thereof as the board deems eligible to be made State depositories.

All applications of banks and trust companies to be made depositories for the moneys of the State shall be made in writing and be filed with the chairman of the board of deposit. The board of deposit after considering said application shall endorse thereon the words "approved" or "rejected" and sign the same by each member of the board or a majority thereof.

Bids shall be received by the Treasurer of State every two years beginning at one o'clock P. M. on the first Monday in March and closing at one o'clock P. M. on the third Monday in March in each odd numbered year. All bids shall be opened publicly by the Treasurer of State and be preserved and open to public inspection at all times and no awards for the deposit of State funds shall be made otherwise than upon such competitive bidding. Section 328, General Code. Bids shall be received for two classes of depositories, one to be known as active depositories and the other as inactive depositories. After said bids have been received and opened awards shall be made of said funds in accordance with Sections 326 and 330, of the General Code, which read as follows:

Sec. 326. "Treasurer of state shall not keep at any one time more than

fifty thousand dollars (\$50,000.00) as a reserve in the treasury vault, and all other moneys of the state shall be deposited as hereinafter provided."

Sec. 330. "After bids have been opened the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidders.

The treasurer of state shall deposit the state funds in such banks and trust companies after such applications have been approved by the board of deposit. Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders; first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award and then the next highest bidders."

It is further provided that no inactive depository shall have on deposit at any time State funds and State insurance funds in excess of the amount of its paid in capital stock and in no event more than \$300,000. No active depository shall have on deposit at any time State funds and State insurance funds in excess of double the amount of its paid in capital stock. The Treasurer of State is authorized to withdraw any or all of the State funds on deposit for the purpose of paying appropriations and obligations of the State and, when necessary to withdraw funds from the inactive depositories, they shall be withdrawn from the banks and trust companies paying the lowest rates of interest and in proportionate amounts as nearly as practicable. No funds shall be deposited in any designated State depository unless the bank or trust company receiving the deposit secure the same in the manner provided by Section 330-3, General Code. When State funds are deposited in State depositories, in compliance with law, the Treasurer of State is absolved from any personal liability for moneys lost by reason of the failure or insolvency of the bank or trust company selected as a State depository.

There are three necessary requirements to be met before the State Treasurer is authorized to deposit the funds of the State in any bank. First, the bank must have made application to become a depository of State funds, and must have been approved by the State Board of Deposit. Second, the law with respect to awards for the deposit of State funds upon competitive bidding must be complied with. Third, proper security in accordance with law must be given by the bank receiving the deposit. Under analogous statutory provisions relating to the deposit of public funds by boards of education (Sections 7606 and 7607) it has been held that:

"In receiving bids and letting a contract for the deposit of public funds by a board of education \* \* \* providing that full publicity be given in connection therewith, such provisions are mandatory and substantial compliance therewith must be had."

*State ex rel. vs. Board of Education*, 103 O. S. 54.

The State depository law is comprehensive in terms and apparently seeks to provide for the designation of State depositories and the award of all State funds except the reserve fund provided for by Section 326, supra, once every two years on or before the first Monday in April of each odd numbered year. When funds in addition to the amount of the awards made at such time become available between bidding periods, they should be awarded as provided by Section 330, General Code, to the highest bidder after their applications have been approved by the Board of Deposit:

"First to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to

receive the full amount of their original award and then the next highest bidders."

If at such times there do not exist any banks or trust companies which meet the requirements fixed by Section 330, General Code, to receive the awards of such "additional funds," it becomes important to determine what the State Treasurer's duties are with reference to these additional funds.

Perhaps in practice there would never arise a situation in which there would be no available banks or trust companies to which an award of these "additional funds" might be made, in accordance with Section 330, General Code, yet there is a possibility of such a situation arising.

There is no provision for the receipt of bids at any other time than at the regular biennial periods fixed by statute. There is, however, provision for the Board of Deposit to register its "approval" or "rejection" of banks and trust companies at other times than at the regular biennial meeting time fixed by statute. The statute, Section 323, General Code, provides that the Board of Deposit shall meet "as often as is necessary at the call of the chairman." So that if "additional state funds" become available between bidding periods, and no banks or trust companies are eligible to receive awards of these funds by reason of their not having been approved by the Board of Deposit, it becomes the duty of the board, at the call of its chairman, to hold a special meeting at which such approval may be made, providing there are applications upon which the board may act. If, however, there are no applications and no bids available, the Treasurer is in the same position with respect to these "additional funds" as though there were no depository law at all. That is to say, there is no statutory authority for the deposit of such funds and the Treasurer has no authority to deposit them in a depository.

Section 326, *supra*, wherein it provides that all other moneys than the reserve fund of not more than \$50,000 shall be deposited "as herein provided" must be construed to mean deposited, as provided in the depository law, and if that law makes no provision for the deposit of a portion of the State funds the Treasurer is not authorized to deposit it in a public depository and must keep that portion of the funds in the treasury as funds were required to be kept prior to the passage of the depository law.

The preservation of the public funds has under the policy of our State been the subject of especial care, and it is my opinion that to uphold the right of a bank as a public depository, to retain public funds deposited with it by a public official, clear compliance with legislative expression and prescribed conditions in all their material features is required.

It appears that eleven banks enumerated in the Auditor's report referred to in your inquiry were not regularly approved by the Board of Deposits nor did they regularly make application or submit bids for receiving public funds on deposit and are therefore not eligible to be designated "public depositories" and receive public funds.

You are therefore advised that it is your duty to withdraw all State funds from said banks and award such funds to banks which appear as highest bidders at the last bidding period, to-wit, the first Monday in April, 1927: First to the banks and trust companies from which deposits have been withdrawn to meet obligations of the State, second to those who have failed to receive the full amount of their original award, and then to the next highest bidders, if such banks are approved by the State Board of Deposit, providing there are such banks or trust companies to whom awards may lawfully be made in accordance with Section 330, *supra*, and if there do not exist such banks and trust companies the funds should be kept in the State treasury until such time as proper awards may be made in accordance with law.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*