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1. MUNICIPALITY—MAY NOT BY ORDINANCE OR CONTRACT DELEGATE TO OTHERS DISCRETIONARY POWERS DELEGATED TO MUNICIPAL OFFICIALS BY STATE LAW.
2. CITY ORDINANCE AND CONTRACT—APPOINTMENT OF INVESTMENT CONSULTANT—INVESTMENT, SURPLUS MUNICIPAL FUNDS—DELEGATION OF AUTHORITY—SELECTION, INVESTMENT SECURITIES—SECTION 4296-2 G. C. DELEGATES DISCRETIONARY AUTHORITY TO CERTAIN MUNICIPAL OFFICIALS TO MAKE DETERMINATION.
3. SECTION 4296-4 G. C. PROVIDES MANDATORY PROCEDURE FOR CUSTODY AND SAFE KEEPING OF SECURITIES BELONGING TO CITY TREASURY—INVESTMENT SECURITIES OF A MUNICIPALITY MAY NOT BE HELD IN NEW YORK FOR SAFEKEEPING.

SYLLABUS:

1. A municipality may not, either by ordinance or contract, delegate to others discretionary powers delegated to municipal officials by state law.
2. City ordinance and contract entered into pursuant thereto concerning the appointment of an investment consultant and the investment of surplus municipal funds, to the extent that they involve delegation of authority to the investment consultant to select the securities in which such funds shall be invested, are in conflict with Section 4296-2 of the General Code which delegates discretionary authority to certain municipal officials to make this determination.
3. It would be improper to hold in New York for safekeeping the investment securities of a municipality, in view of Section 4296-4 of the General Code which provides a mandatory procedure for the custody and safe-keeping of securities belonging to the treasury of any city.

Columbus, Ohio, May 18, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

“We are enclosing herewith copies of correspondence received from our city of Toledo Examiner, together with copies

of certain legislation passed by Council, creating an 'Investment Board' and authorizing a contract for the employment of 'Expert Consultant Service' to assist municipal officers who administer the treasury investment funds and accounts.

"Will you kindly examine the enclosures and give us your formal Opinion in answer to the following questions :

"1. Under statutory and the contract provisions, is it legal for the auditor of the city of Toledo to issue city warrants payable to the consultant bank for the purpose of investing such funds as they see fit?

"2. In view of the provisions of Sections 2296-4, 4296-4, of the General Code, and Ordinance No. 224-36 is it legal for the city of Toledo to permit the investment securities purchased through a duly employed consultant bank to be held in a bank located in New York City?

"3. If the answer to question 2 is in the affirmative, is it legal and proper for the city to accept and hold the receipts issued by said New York City Bank and the Consultant Bank for the investments owned by said city and held in the New York City bank, or should the city investment board be in possession of collateral, or other lawful security as protection against possible loss of investments held in the New York City Bank?"

I shall first review the portions of the General Code which are pertinent to your inquiry. The General Code makes detailed provision for the investment of funds held in municipal treasuries which are not required to meet immediate needs.

Section 4296-1 authorizes the legislative authority of any municipality to provide by ordinance that money in its treasury which will not be required to be used for six months may be invested in certain types of obligations and bonds.

Section 4296-2 specifies that whenever municipal funds are to be invested, as provided for in the preceding section :

"* * *, the auditor or other chief fiscal officer shall submit to the mayor, or to the chief executive officer if the mayor be not such, and to the chief law officer of such city, a statement of moneys in the treasury or in the process of collection, and a schedule showing the probable requirements of money for the use of the municipality for such period not less than six months as the aforesaid ordinance or the chief executive officer shall direct, together with a recommendation as to whether any moneys in the treasury shall be invested in such obligations. The mayor

or other chief executive officer, the chief law officer, and the auditor or other chief fiscal officer may thereupon order such investments of moneys in the treasury in such obligations, at not more than the current market value, as they may deem advisable in the interest of the municipality. It shall not be necessary to advertise such bonds before such investment is made. No investment shall be made except in obligations which have been passed upon and approved as to validity by a reputable firm of bond attorneys. * * *

Section 4296-3 requires the chief accounting officer of each municipality to maintain a "treasury investment account" to keep track of municipal funds invested pursuant to the two preceding sections.

Section 4296-4 sets forth detailed procedure for the custody and safe-keeping of securities belonging to the treasury of any municipality, as follows:

"All securities belonging to the treasury of any city or to any fund thereof, other than the sinking fund, shall be in the custody of the city treasurer, and shall be kept by him in a safe deposit box or vault belonging to a regular city depository. Such safe deposit box or vault shall be opened only in the presence of one or more of the three officers named in section 4296-2 hereof, and only upon a warrant or order of the chief accounting officer directing the deposit or removal of securities purchased or sold, or the clipping of interest coupons for collection. A report of whatever is placed in or removed from such safe deposit box or vault upon any such occasion shall be signed by the treasurer and by the witness or witnesses required by this section and shall be returned to the chief accounting officer upon the same day. Whenever any securities are so held for the city the officers having power to make such investments shall be bonded in amounts to be stipulated by ordinance. Such bonds may cover other contingencies in which such officers might become liable to the city."

Section 2296-4, referred to in your letter, does not appear to be particularly pertinent.

I understand that the charter of the city of Toledo is silent on the subject of the investment of surplus municipal funds. You called to my specific attention, however, two city ordinances and an agreement entered into between the city and a Toledo bank as investment consultant to the city, all of which I assume were intended to implement the sections of the General Code summarized above. Ordinance No. 224-36 presents no

problem here; it provides simply for the investment of surplus municipal funds and the establishment of a "treasury investment account", adhering closely to the applicable provisions of the General Code. The questions you have submitted involve, essentially, the legality of Ordinance No. 621-48 and the agreement or contract entered into pursuant thereto. Ordinance No. 621-48, enacted December 29, 1948, authorized the city manager of Toledo to contract with a banking institution or individual "for the rendition of expert consultation services and incidental services to those municipal officers who administer the Treasury Investment Account of the City of Toledo", and to pay for such services at the rate of not more than 5% of the income derived from the funds invested pursuant to the advice received. Pursuant to this delegation of authority, the city manager appointed and contracted with a Toledo bank to serve as investment consultant for the city. The agreement states specifically that the services to be performed by the consultant shall be those provided for in Ordinance No. 621-48, "including the keeping of records of investments and rendering consultation services to the City Officials charged with administering the City investment account." The consultant receives compensation at the maximum rate of 5%; the agreement is to run until December 31, 1976, unless sooner terminated.

Your question number 2 arises from the practice which has been followed under the agreement with respect to the safe-keeping of the securities purchased through the consultant. That is, when eligible funds are available the city auditor issues a voucher and warrant covering the amount payable to the investment consultant. The consultant in turn makes the necessary investments, apparently through New York banking connections since the investments are held for safe-keeping in a New York bank. Upon purchase of securities and their deposit for safe-keeping, the city is notified of the securities held and a receipt is received from the consultant and another from the New York bank holding the securities. No collateral or security other than the receipts is received by the city for the securities held in New York.

After careful consideration of the statutory provisions involved, the applicable Toledo ordinance and the agreement entered into pursuant thereto, it is readily seen that the basic issue with respect to your question number 1 concerns the delegability of the authority delegated by General Code Section 4296-2 to certain municipal officials to determine the securities in which surplus municipal funds shall be invested. It

cannot be questioned that this authority is in the nature of a discretionary grant to be exercised by the designated officials. The language of the statute is eminently clear; the funds of the municipality shall be invested "in such obligations * * * as they may deem advisable in the interest of the municipality."

It is a general and well established rule of law that discretionary authority delegated to public officials cannot be delegated by them to anyone else. The presumption is that when the legislature specifies that certain officials shall exercise discretion in the performance of specified duties, the exercise of this discretion may not be turned over to others, whether the transfer is effected by ordinance or by contract. The general rule is stated in McQuillan, *The Law of Municipal Corporations*, vol. 1 (1940 rev.), section 693, page 1094, as follows:

"* * * Therefore, the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others."

And in section 394, page 1101, it is stated as follows:

"* * * Whatever duties are imposed on officers by law must be personally discharged by them and the city cannot relieve its officers from discharging their regular duties by contracting by ordinance or otherwise with other persons to perform part or all of them."

In vol. 3 (1943 rev.), section 1271, page 1112, the rule with respect to municipal contracts conferring or delegating to others powers which properly belong to a designated official or department is stated as follows:

"The established rule is that municipal corporations have no power to make contracts which will embarrass or control them in the performance of their legislative powers and duties."

See also 32 O. Jur., pp. 946 and 947.

I believe it is clear that the city of Toledo, through Ordinance No. 621-48 and the contract entered into pursuant thereto, is in effect substituting the discretion of an investment consultant for that of its officials delegated such discretion under Section 4296-2, quoted above. I am therefore of the opinion that the Ordinance and the contract are contrary to law.

It hardly seems necessary to give separate treatment to your second question after the determination that the basic contract under which the securities are held in New York is illegal. Nevertheless, I should like to point out that the provisions of section 4296-4 concerning the custody and safe keeping of securities belonging to the treasury of any city would appear to apply to the securities in question, and the language used makes it clear that it is the mandatory duty of the city treasurer to follow the procedure provided for therein.

In view of the preceding I am compelled to answer your questions as follows :

1. The auditor of the city of Toledo may not issue warrants payable to an investment consultant for the purpose of investing municipal funds as it sees fit.
2. Investment securities purchased by the city of Toledo may not be held in safe keeping in a New York bank, but must be held in custody by the city treasurer in accordance with Section 4296-4 of the General Code.
3. The answer to this question is not necessary in view of the answer to question 2.

Respectfully,

HERBERT S. DUFFY,
Attorney General