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1. MUNICIPALITY—PRINCIPAL CONDITION PRECEDENT TO INVESTMENT OF SURPLUS MUNICIPAL FUNDS IS A DETERMINATION THAT SUM INVOLVED IS NOT REQUIRED TO BE USED BY MUNICIPALITY FOR SIX MONTHS OR MORE—SECTIONS 4296-1, 4296-2 G. C.
2. INCONSISTENT FOR INVESTMENT BOARD OF MUNICIPALITY TO PURCHASE NEW MUNICIPAL BOND ISSUE AND NEXT DAY TO DISPOSE OF THE BOND ISSUE AT PRIVATE SALE TO FIRM OF BOND BROKERS.
3. PRIVATE SALE OF MUNICIPAL BONDS—SECTION 2293-28 G. C. APPLIES ONLY TO INITIAL ISSUE AND SALE OF MUNICIPAL BONDS—SECTION DOES NOT APPLY TO RESALE OF SUCH BONDS BY MUNICIPAL INVESTMENT BOARD UNDER SECTION 4296-2 G. C.

SYLLABUS:

1. The principal condition precedent to the investment of surplus municipal funds under Sections 4296-1 and 4296-2 of the General Code is a determination that the sum involved is not required to be used by the municipality for six months or more.

2. It would be inconsistent with the letter and the spirit of Sections 4296-1 and 4296-2 of the General Code for the investment board of a municipality, while in the process of liquidating other investments presumably to obtain operating funds for the municipality, to purchase a new municipal bond issue and the very next day to dispose of the issue at private sale to a firm of bond brokers.

3. Section 2293-28, General Code, pertaining to the private sale of municipal bonds, applies only to the initial issue and sale of municipal bonds and, accordingly, said section does not apply to the resale of such bonds by a municipal investment board under Section 4296-2 of the General Code.

Columbus, Ohio, August 3, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

This will acknowledge receipt of your recent letter, in which you ask for my opinion on the following questions:

“1. When the treasury investment officers of a city are in the process of liquidating certain investments held by them for the stated purpose of securing the funds necessary for the proper operation of the city, is it lawful for such officers, acting under the authority vested in them by the provisions of Sections 4296-1 and 4296-2, G. C., to purchase new bonds issued by the city without advertising and to immediately sell the same bonds, on the following day, to a firm of bond brokers?

2. Where bonds have been issued by a city and thus sold to the treasury investment account, and said bonds were immediately resold to a firm of bondbrokers, does such transaction result in a violation of the provisions of the Uniform Bond Act, governing the advertising and sale of bonds, and particularly Section 2293-28, G. C.?

3. If the answer to the second question is in the affirmative, is the Bureau of Inspection and Supervision of Public Offices authorized to make findings against the officials responsible for such illegal sale and the purchasers of said bonds for any loss that may result to the city from such illegal transaction?”

I understand that the “investments” to which you refer in the above questions are general obligation bonds of the municipality issued pursuant to the Uniform Bond Act (Section 2293-1 through 2295-15, General Code). Your first question may be divided into two parts. That is, whether or not the Treasury Investment Board, consistently with Sections 4296-1 and 4296-2 of the General Code, (a) may purchase a bond issue from the municipality on the date of its issuance while at the same time liquidating other investments in order to obtain operating funds for the municipality, and (b) the very next day sell said bonds to a firm of bond brokers at private sale.

The pertinent provisions of sections 4296-1 and 4296-2 of the General Code provide as follows :

Section 4296-1 :

“The council or other legislative authority of any municipality may by ordinance provide that whenever there are moneys in the treasury of such municipality which will not be required to be used by such municipality for a period of six months or more, such moneys may in lieu of being deposited in a bank or banks be invested in obligations of such municipality or in bonds or other obligations of the United States, * * * provided, however, that any such investments shall not be made at a price in excess of the current market value of such bonds or other interest bearing obligations, and that said bonds or other interest bearing obligations may be sold for cash and for a sum not less than their current market price, in the manner prescribed in the next succeeding three sections hereof.”

Section 4296-2 :

“Whenever the money in the municipality (municipal) treasury of any municipality is to be invested as provided for in section 4296-1 of the General Code, 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. Whenever it is necessary to convert any such investment into cash, it shall be done by first offering the obligations held by the municipality to the sinking fund commission, and if the sinking fund commission decline to take the same or any part thereof, then such remaining obligations shall be sold in any manner authorized by law for the sale of investments by the sinking fund ; provided, that no such obligations shall be sold for less than the current market value.”

The purchase and disposition of bonds under the above sections must be in strict conformity therewith. *Davis et al v. State, ex rel, Pecsok*, 130 O. S. 411.

It is readily seen that a principal condition precedent to the investment of any municipal funds under the above statutory authority is a determination that the sum involved will not be required to be used by the municipality for six months or more. I can envision a situation where it has been determined that a certain sum of money is excess to municipal requirements for the next six months and the funds turned over to the Investment Board for investment, but due to unforeseen circumstances before six months elapse it might become necessary to liquidate the investments in order to meet the operating expenses of the municipality. In such circumstances, it would be difficult to hold that the letter or the spirit of the law had been violated. However, the first part of your first question presents a different situation. On the very same day that the Investment Board is liquidating some of its investments in order to secure operating funds for the municipality, it purchases a municipal bond issue presumably with funds declared surplus to the city's needs. On its face the situation is incongruous and clearly inconsistent with the letter and spirit of the enabling legislation. The inconsistency of this action is emphasized by referring to the second part of your first question. I must assume that the sale of the bonds the very next day was also occasioned by the need for funds. Following from this, if the funds with which the bond issue was purchased were actually surplus to the immediate needs of the city, it would hardly be necessary for the Investment Board to dispose of the issue at private sale the very next day in order to obtain more funds for the municipality. Certainly this is a clear indication that either the determination as to the funds being surplus to the immediate needs of the municipality was not made as required by the statute, or it was made in defiance of the actual facts.

In view of the preceding, in answer to your first question, I am impelled to the conclusion that it would be inconsistent with the letter and the spirit of Section 4296-1 and Section 4296-2, General Code, authorizing the investment of surplus municipal funds, for the Investment Board of a municipality while in the process of liquidating certain of its investments presumably to obtain operating funds for the municipality, to purchase a new municipal bond issue and the very next day to dispose of the bonds at private sale to a firm of bond brokers.

Your second question suggests the possibility that the transactions referred to above were undertaken in order to avoid the requirements for the advertisement and sale of municipal bonds under the Uniform Bond Act, particularly, Section 2293-28, General Code. In this connection, I should like to refer to the preceding section of the General Code, which requires that before selling municipal notes or bonds they must first be offered to the sinking fund trustees of the municipality, and *City of Cleveland v. Baker et al*, 4 O. App. 68, where the Court of Appeals for Cuyahoga County considered the meaning of earlier analogous sections of the Code and found that they applied to and affected only the initial issue and sale of bonds. In the case cited the court had before it, among other things, a question concerning sale at less than their par value of certain municipal bonds held by sinking fund trustees. The following excerpt from the court's opinion, at pages 77-80, is particularly pertinent:

It is alleged in the petition and argued that the commission has no authority to sell such bonds for less than their par value. Plaintiff claims that the last clause of Section 3923, General Code, which reads, 'In no case shall the bonds of the corporation be sold for less than their par value, nor shall such bonds when so held for the benefit of such sinking fund or debts, be sold, except when necessary to meet the requirements of such fund or debt,' precludes a sale by the commission at less than par. Let it be borne in mind that this clause—in fact, this section—is a part of Section 97 of the municipal code, passed in 1902 (96 O. L., 52), and relates to the issuing and selling of bonds by a municipality. The limitation that the bonds shall in no case be sold for less than their par value plainly applies to and affects the initial issue and sale of bonds. It follows the provision that the municipality shall first offer the bonds to the trustees of the sinking fund and then to certain other officers (now Section 3922, General Code), and the provision that only after the refusal of all such officers to take the bonds shall they be advertised for public sale. The limitation that the bonds when held for the benefit of the sinking fund or debts shall not be sold except when necessary to meet the requirements of the fund or debts, seems to be distinct and apart from that which provides that the bonds shall not be sold for less than their par value. The only limitation imposed when the bonds are held for the benefit of the sinking fund is that they shall not be sold except when necessary to meet the requirements of such fund or debt. * * *

"It follows from what has been said that the sinking fund commission is not required to publish notice of the sale of the bonds for thirty days as required by statute in the case of the

sale of bonds by a municipality, and that it is not precluded from selling the bonds at less than par."

In view of the clear language of Sections 2293-27 and 2293-28, General Code, and the above quotation from the City of Cleveland case I am inclined to the view that the advertising and bidding requirements of Section 2293-28, General Code, apply only to the initial issue and sale of municipal bonds. Therefore, in answer to your second question, I am of the opinion that Section 2293-28, General Code, does not apply to the resale of such bonds by a municipal Investment Board under Section 4296-2.

Before passing to your third question, I believe it appropriate to call to your attention 1942 Opinions of the Attorney General, p. 198 and 1942 Opinions of the Attorney General, p. 835, in which is discussed the powers of sinking fund trustees to sell securities in their possession, whose powers in such matters, I believe, are analogous to those of Investment Boards operating under Section 4296-2 of the General Code.

Since I have, in effect, answered your second question in the negative, it does not appear necessary to answer your third question. However, I should probably mention that as a general rule a public official is liable for losses of public funds incurred through his failure to comply with statutory obligations imposed upon him. In this connection, I should like to refer to 1937 Opinions of the Attorney General, p. 120; the first paragraph of the syllabus reads as follows:

"An examiner operating under the Bureau of Inspection and Supervision of Public Offices, is fully warranted in making a finding against all persons, severally and jointly, guilty of misfeasance in office, which misfeasance results in a loss of public funds."

In conclusion, I should like to mention that in considering the questions presented I have assumed that there has been full compliance with the law in connection with the acquisition and disposition of investments under Sections 4296-1 and 4296-2, General Code, except to the extent to the contrary indicated by your questions.

Respectfully,

HERBERT S. DUFFY,
Attorney General.