

OPINION 65-97

Syllabus:

1. A public depository for the deposit of inactive and uninvested firemen's and police relief and pension funds of a non-charter municipal corporation must be designated pursuant to Section 135.01, et seq., Revised Code, and the treasurer, as custodian, must deposit the funds with such designated depository or depositories.

2. Unless the charter of a municipal corporation provides for the proper deposit of public moneys, the treasurer must de-

posit inactive and uninvested firemen's and police relief and pension funds in a properly designated public depository pursuant to Section 135.01, et seq., Revised Code.

3. The treasurer must deposit inactive and uninvested firemen's and police relief and pension funds in a designated public depository but any deposit in excess of \$10,000 must be secured by collateral security from the depository as provided in Section 135.16, Revised Code.

4. The trustees of the firemen's and police relief and pension funds may not direct nor the treasurer deposit money in any one bank the total of which is in excess of the \$10,000 insurance coverage by the federal deposit insurance corporation as an investment pursuant to Section 741.14 and Section 741.45, Revised Code.

To: Chester W. Goble, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, May 25, 1965

Your request for my opinion reads in part:

"Recently one of our State Examiners in the Municipal Division, of the Bureau of Inspection and Supervision of Public Offices, had a problem arise concerning the inactive deposits, as authorized under Chapter 135 of the Revised Code, of police and firemen's relief and pension funds in several different accounts in the same depository whereby the amounts in each account amounted to over \$10,000.00., such excess to be secured by collateral security. We enclose a copy of this letter which explains more specifically the problem involved.

"Due to the increased number of police and firemen's pension funds in the State, their numerous beneficiaries, and the large amounts of money involved in such funds, we feel the necessity of and respectfully ask for your consideration and opinion on the following questions:

- "1. May police and firemen's relief and pension funds of a non-charter municipality be deposited in a bank as inactive deposits as authorized by Chapter 135, Revised Code?
- "2. May police and firemen's relief and pension funds of a charter municipality be deposited in a bank as inactive deposits?
- "3. If the answer to either or both questions 1 and 2 is yes, may such funds be deposited in excess of

\$10,000.00 with the bank covering such excess by collateral security?

- "4. As authorized by Sections 741.14 and 741.45, Revised Code, may police and firemen's relief and pension funds be deposited in one financial institution in various accounts with no account containing more than \$10,000.00?"

I wish to preface this opinion with the statement that all comments made herein with regard to "the pension funds" are equally applicable to the firemen's relief and pension fund and the police relief and pension fund which are provided for in substantially the same manner under Chapter 741, Revised Code. Reference to code sections will relate to the firemen's relief and pension fund and the police relief and pension fund respectively.

The money credited to the pension funds for municipal corporations is received from tax revenues, disciplinary fines, penalties for violations of state laws and local ordinances, service fees, donations and member contributions. Section 741.13 and Section 741.44, Revised Code, provide that all money and investments of such funds shall be held in the custody of the treasurer of the municipal corporation and paid out upon order of the board of trustees for the two funds. The trustees have no power to designate any other person as custodian of the pension funds. Opinion No. 25, Opinions of the Attorney General for 1927, page 36.

Chapter 741, Revised Code, which sets forth the laws governing the pension funds, contains no specific provisions for the deposit of inactive funds held in the custody of the treasurer. Section 741.14 and Section 741.45, Revised Code, set forth the legal investments which the trustees may make with the portion of the funds not needed for current obligations. These sections, however, set forth the discretionary power which the trustees have as to the investment of the pension funds and are completely unrelated to the manner in which the treasurer as custodian shall hold active or inactive and uninvested funds. In the absence of any specific designation in Chapter 741, supra, for the deposit of funds in the custody of the treasurer, it is necessary to determine if such funds are subject to the Uniform Depository Act, Chapter 135, Revised Code.

Section 135.01, Revised Code, defines "public moneys" as provided for under this act as follows:

"As used in sections 135.01 to 135.23, inclusive, of the Revised Code:

"(A) 'Public moneys' means all moneys in the treasury of the state or any subdivisions of the state, or moneys coming lawfully into the possession or custody of the treasurer of state or of the treasurer of any subdivision. * * *; and 'public moneys of a subdivision' includes all such moneys coming lawfully into the possession of the treasurer of the subdivision."

It is without question that the pension funds held by the treasurer of a municipal corporation are moneys "coming lawfully into the possession or custody of the treasurer" as provided for in Section 741.13 and Section 741.44, *supra*. Such funds, therefore, would clearly constitute "public moneys" as defined in this act.

Section 135.15, Revised Code, provides as follows:

"Each treasurer may at all times keep in the vaults of his office such amount, as a cash reserve, as is prescribed by the proper governing board, which amount shall not be required to be deposited pursuant to sections 135.01 to 135.23, inclusive of the Revised Code. Each treasurer shall deposit all the remaining public moneys in his possession at the commencement of each period of award in the public depository designated by the board, except to the extent that provision has been lawfully made for the investment of such public moneys in lieu of their being deposited in a depository."

It is clear from a reading of this section and Section 135.07, Revised Code, through Section 135.12, Revised Code, inclusive, which provide for the estimate of inactive and active public funds, the designation of a public depository or depositories for the deposit of such funds, and the designation of a depository for any funds in excess of such estimates, that it is mandatory that a depository be designated in accordance with this act and that the treasurer deposit active as well as inactive and uninvested pension funds accordingly.

Opinion No. 3052, Opinions of the Attorney General for 1953, page 439, held it was the duty of the board of trustees for a municipal library district to designate a depository in accordance with Section 135.01, *et seq.*, *supra*, for the deposit of all moneys, from whatsoever source, received by the clerk of the library district. This conclusion was affirmed in Opinion No. 1537, Opinions of the Attorney General for 1960, page 489, although this opinion overruled the second paragraph of the syllabus of the 1953 Opinion No. 3052, *supra*, which is not pertinent to your request. In Opinion No. 2326, Opinions of the Attorney General for 1950, page 646, it was determined that the pension funds could be deposited in a public depository under the Uniform Depository Act, Section 135.01, *et seq.*, *supra*, in separate deposit accounts apart from any other funds coming into the possession of the treasurer. Once the proper designation of a public depository is made for these funds, it then becomes the duty of the treasurer to deposit the funds accordingly. State, ex rel. The Second National Bank of Warren, et al. v. Harkelrode, Treas., 34 Ohio App. 279; Opinion No. 962, Opinions of the Attorney General for 1964, page 2-138.

Therefore in answer to your first inquiry, it is my opinion that a public depository must be designated pursuant to Section 135.01, *et seq.*, *supra*, for the deposit of inactive and uninvested pension funds of a non-charter municipal corporation and the treasurer not only may but must deposit the funds with the designated depository or depositories.

Section 135.01, supra, defines "subdivision" as used in the definition of "public moneys of a subdivision" as follows:

"(B) 'Subdivision' means any county, school district, municipal corporation, except a municipal corporation or a county which has adopted a charter under Article XVIII or Article X, Ohio Constitution, having special provisions respecting the deposit of the public moneys of such municipal corporation or county, township, municipal or school district sinking fund, special taxing or assessment district, or other district or local authority electing or appointing a treasurer.* * *"

Therefore, in answer to your second inquiry, I conclude that unless the charter of a municipal corporation specifically provides for the proper deposit of public moneys, the treasurer of a charter municipal corporation must deposit inactive and uninvested pension funds in accordance with the designation of a public depository made pursuant to Section 135.01, et seq., supra. See Opinion No. 1059, Opinions of the Attorney General for 1937, page 1859.

Section 135.16, Revised Code, requires in pertinent part that the following security be provided by a bank designated as a public depository for public moneys received by a treasurer:

"The treasurer, before making any deposit in a public depository pursuant to an award made under sections 135.01 and to 135.23, inclusive, of the Revised Code, shall require the institution designated as a public depository to pledge to and deposit with him, as security for the repayment of all public money to be deposited in the public depository during the period of designation pursuant to the award, eligible securities of aggregate market value equal to the excess of the amount of public moneys to be at the time so deposited, over and above such portion or amount of such moneys as is at such time insured by the federal deposit insurance corporation or by any other agency or instrumentality of the federal government or the treasurer may require such institution to deposit with him surety company bonds which when executed shall be for an amount equal to such excess amount;* * *"

Pursuant to the Federal Deposit Insurance Act, 12 U.S.C. Section 1813 (m) an "insured deposit" is defined as follows:

"(m) The term 'insured deposit' means the net amount due to any depositor for deposits in an insured bank (after deducting offsets) less any part thereof which is in excess of \$10,000. Such net

amount shall be determined according to such regulations as the Board of Directors may prescribe, and in determining the amount due to any depositor there shall be added together all deposits in the bank maintained in the same capacity and the same right for his benefit either in his own name or in the names of others except trust funds which shall then be insured as provided in subsection (i) of section 1817 of this title. Each officer, employee, or agent* * *of any county, of any municipality, or of any political subdivision thereof, herein called 'public unit', having official custody of public funds and lawfully depositing the same in an insured bank shall, for the purpose of determining the amount of the insured deposits, be deemed a depositor in such custodial capacity separate and distinct from any other officer, employee, or agent of the same or any public unit having official custody of public funds and lawfully depositing the same in the same insured bank in custodial capacity."

In the 1950 Opinion No. 2326, supra, it was considered what constituted a deposit held in the "same capacity and the same right" for purposes of determining an "insured deposit" under the Federal Deposit Insurance Act. It was stated in pertinent part as follows on page 654:

"It is thus to be observed that the term, 'same right and capacity,' as used in Title 12, Section 264, U. S. Code (now Title 12, Section 1813, U. S. Code), has been construed administratively and by the federal courts to permit segregation, for insurance purposes, of those funds (a) in which the depositor has only a part ownership by virtue of his special relationship with others, as in the case of partnership funds, community funds, joint ownership with the right of survivorship and the like, and (b) those of which the depositor is not the absolute owner but rather by virtue of contractual or statutory provision, is the temporary custodian with less than full legal and equitable ownership."

This opinion specifically referred to the separate insurance coverage of pension funds of a municipal corporation on pages 655 and 656 in pertinent part as follows:

"With respect to the firemen's pension fund and the police pension fund, the municipal treasurer is merely custodian.* * *

"The statutory provisions relating to the authorized purposes for which these funds may be expended, and making retired

firemen and policemen the beneficiaries in such funds, clearly indicate that such funds are held by the municipality as trustees only."

Therefore, in answer to your third inquiry, it is my opinion that the treasurer may deposit the pension funds in two separate inactive accounts as custodian of the two funds and each will be insured by the federal deposit insurance corporation up to \$10,000. Any deposit in an account in excess of \$10,000 must be covered by collateral security from the depository as required by Section 135.16, supra, before the treasurer can make such a deposit.

Section 741.14 and Section 741.45, Revised Code, set forth the investment powers of the trustees of the two pension funds. Section 741.14, supra, reads in part as follows:

"The board of trustees of the firemen's relief and pension fund may invest moneys received by the board* * *in certificates or other evidences of deposit issued by a national bank located in the state or a state bank located in and organized under the laws of the state; in savings accounts in a national bank located in the state or a state bank located in and organized under the laws of the state by depositing such funds therein; provided that no deposit shall be made unless the deposits of the depository bank are insured by the federal deposit insurance corporation created under an act of congress, entitled the 'Federal Deposit Insurance Act', 64 Stat. 873, 12 U.S.C. 1811 (1950), and amendments thereto and provided that the deposit of the funds in any such savings accounts in any one bank shall not exceed the sum insured under said act and amendments thereto; * * *"

Section 741.45, supra, reads in pertinent part the same as Section 741.14, supra, as herein quoted. These sections permit the trustees to invest the prescribed amount of the funds in various named accounts and securities and such authority is an addition to and separate from the investment powers granted under Section 135.16, Revised Code, of the Uniform Depository Act. See Opinion No. 826, Opinions of the Attorney General for 1964, page 2-43.

Therefore, the following comments relate solely to the investment powers of the trustees for the pension funds as provided by Chapter 741, supra. Investment deposits of the pension funds made in any one bank are specifically limited by law to an amount not in excess of the maximum insurance coverage by the federal deposit insurance corporation. You have indicated, however, that the opinion has been advanced that these pension funds could be divided into as many trust funds as there are beneficiaries and thereby the deposit limitation prescribed in Section 741.14 and Section 741.45, supra, could be avoided. A beneficiary of a pension fund was defined in The State, ex rel. Curran, Gdn. v.

Brookes, Jr., 144 Ohio St., 582, to include those persons receiving pension and disability benefits as well as all members to whom benefits will accrue in the future. Consequently, under this theory a separate account under \$10,000 could be established in a bank for all members and pensioners of each fund. The answer to this proposition depends upon whether such separate deposits in a bank would each constitute an "insured deposit" as defined in Section 1813 (m), supra, of the federal act pursuant to the "same capacity and the same right" test.

The money deposited by the treasurer upon the direction of the trustees of the fund is deposited by the treasurer in his capacity as "the custodian" of the particular fund for the benefit of all the beneficiaries and the right of the treasurer to withdraw such deposits depends solely upon the direction and "proper order of the board of trustees." See Section 741.13 and Section 741.44, supra. This capacity and right of the treasurer, as depositor, in my opinion remains the same regardless of how many separate deposits of these funds are made in any one bank.

It is of note that the members of the fund lose all dominion over the contributions deducted from their salaries and have no vested interest in the fund until the happening of certain contingencies and the granting of a pension. See Opinion No. 1954, Opinions of the Attorney General for 1933, page 1080; Section 741.15 and Section 741.46, Revised Code. Such an interest, however, goes only to the right to money due and owing at any particular time, and, pursuant to the investment provisions, money to meet current obligations of the funds for six months cannot be invested. Consequently, the treasurer deposits money held as custodian for the benefit of all the beneficiaries and no portion can be segregated for the sole benefit of any one member or pensioner. The treasurer as the depositor maintains the same capacity and the same right with regards to any investment deposit of the fund and if separate deposits were made in one bank all of the deposits would be taken together in the aggregate to determine the amount of deposit insurance coverage.

The same conclusion was reached in Billings County v. Federal Deposit Insurance Corporation, 71 F. Supp., 696, in which the court had to determine the insurance on various deposits made by a county treasurer. Of the seven accounts held in one bank, five were certificates of deposit representing tax assessments held solely for the benefit of certain bondholders. The court stated in part on page 702:

"* * *The certificates of deposit were maintained by the treasurer in his capacity as custodian of funds raised by Billings County as a taxing district for the benefit of the bondholders and impressed with the statutory limitation that such could be used only to refund the bonds and that they must be kept 'in a separate special fund' for that purpose.

"This Court is accordingly of the opinion that the total of the certificates of deposit represents a deposit

by the Billings County treasurer as custodian in a different capacity and in a different right from that with which he maintained the general deposit in the open checking account, and that the defendant owed an additional insured liability of \$5,000 thereon."

In answer to your last inquiry, it is my opinion that the trustees cannot direct nor the treasurer deposit as investments more than a total of \$10,000 of either fund in one or more deposits in any one bank.

Therefore, it is my opinion and you are hereby advised:

A public depository for the deposit of inactive and uninvested firemen's and police relief and pension funds of a non-charter municipal corporation must be designated pursuant to Section 135.01, et seq., Revised Code, and the treasurer, as custodian, must deposit the funds with such designated depository or depositories.

Unless the charter of a municipal corporation provides for the proper deposit of public moneys, the treasurer must deposit inactive and uninvested firemen's and police relief and pension funds in a properly designated public depository pursuant to Section 135.01, et seq., Revised Code.

The treasurer must deposit inactive and uninvested firemen's and police relief and pension funds in a designated public depository but any deposit in excess of \$10,000 must be secured by collateral security from the depository as provided in Section 135.16, Revised Code.

The trustees of the firemen's and police relief and pension funds may not direct nor the treasurer deposit money in any one bank the total of which is in excess of the \$10,000 insurance coverage by the federal deposit insurance corporation as an investment pursuant to Section 741.14 and Section 741.45, Revised Code.