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1. DEPOSITORY, PUBLIC — MAY NOT MAKE SERVICE CHARGE AGAINST ACTIVE PUBLIC DEPOSIT NOR COLLECT FROM TREASURER OF SUBDIVISION MAKING DEPOSIT UNDER DEPOSITORY CONTRACT—PROVISO, UNLESS SERVICE CHARGE IS SAME AS CUSTOMARILY IMPOSED BY INSTITUTIONS RECEIVING MONEY ON DEPOSIT SUBJECT TO CHECK—MUNICIPAL CORPORATION WHERE PUBLIC DEPOSITORY LOCATED—CHARGE MAY BE PAID FROM GENERAL FUNDS OF SUBDIVISION —SECTION 135.22 RC.
2. SCHOOL DISTRICT BOND-ISSUER—DESIGNATED CERTAIN BANK ITS "PAYING AGENT"—BOND PRINCIPAL AND INTEREST—SCHOOL DISTRICT MAY LAWFULLY CONTRACT WITH BANK FOR PAYMENT OF SERVICES IN CONNECTION WITH SCHOOL DISTRICT'S BOND AND COUPON ACCOUNT—EXPENSE MAY BE MET FROM BOND PAYMENT FUND, SINKING FUND OR GENERAL FUND.
3. IN ABSENCE OF "SERVICE CHARGE" AGREEMENT BETWEEN SCHOOL DISTRICT BOND-ISSUER AND BANK DESIGNATED DISTRICT'S "PAYING AGENT" CONCERNING BONDS, DISTRICT UNAUTHORIZED TO PAY BANK A FEE OR CHARGE FOR SERVICES BY BANK AS "PAYING AGENT" FOR SCHOOL DISTRICT ON ITS BONDS.

SYLLABUS:

1. Pursuant to Section 135.22, Revised Code, Section 2296-20, G. C., a public depository may not make a service charge against an active public deposit nor collect the same from the treasurer of the subdivision making the deposit under depository contract, unless such service charge is the same as is customarily imposed by institutions receiving money on deposit subject to check, in the municipal corporation in which the public depository of such deposit is located; the charge lawfully may be paid from the general funds of the subdivision.

2. A school district bond-issuer, having designated a certain bank as its "paying agent" with respect to the payment of the bond principal and interest, may lawfully contract with the bank, obligating the school district to pay the bank for its payment services to be rendered in connection with the school district's bond and coupon account, and the school district may meet the expense occasioned by the service charge, from the bond payment fund, the sinking fund, or from the general fund.

3. In the absence of a "service charge" agreement between a school district bond-issuer and a bank designated as the district's "paying agent" concerning the district's bonds, the school district is unauthorized to pay the bank a fee or charge for the services rendered by the bank as "paying agent" for the school district on its bonds.

Columbus, Ohio, July 29, 1954

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

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

> "The C Local School District some time ago issued General Obligation Bonds. It designated the First National Bank as paying agent. Said bank is still the paying agent.
>
> "Recently the First National Bank, when certain matured bonds and coupons became due, levied a service charge against the holder of the bonds for making the payment out of the account set aside for this purpose. The payee or the holder of the bonds is now asking that the school board, which issued the bonds, reimburse him for this payment or order the paying bank to cancel its service charge, which it deducted from the amount payable to the bond holder.
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> "At the time the First National Bank accepted the responsibility as paying agent nothing was said about the imposition of a service charge for acting as the paying agent of the school board of C Local School District.

"I can find nothing in the Statutes, insofar as the Uniform Depository Act is concerned, which permits a service charge by banks acting as paying agents; yet I am inclined to believe it would be perfectly legal for a bank, when it enters into a contract as an active or inactive depository of public funds, to, in its bid proposal state that the acceptance of the proposal is conditioned upon a charge to be made for each check or certificate of indebtedness that is deposited and a charge for each deposit of cash and likewise a charge for each check that is drawn upon the account. It is a bank custom and policy, and has been for a number of years, to charge the depositor for each check issued and each item of deposit made, which is offset by a credit for the lowest balance standing in the account during each month.

"Accordingly, an opinion is requested as to whether or not:

1. A bank may lawfully assess a charge against a political subdivision for each item deposited and for each item credited to the active account.
2. In the absence of a specific agreement between the School District and the Bank, acting as paying agent, whether or not a charge may be made for acting as paying agent for the items handled in the Bond and Coupon Account.
3. If you answer in the affirmative to Question No. 2, whether or not the bond holder or the bond payer (the School District) should be responsible for the charge.
4. May the School District in designating the paying agent lawfully enter into a contract setting forth the charge which such paying agent may make for such purpose.
5. If such charge is valid, whether it should be paid for out of the General Fund or in the case of a Bond and Coupon Account out of the Bond Retirement Fund."

Your first question relates to service charges made by a bank against a "political subdivision" for items deposited and credited to the active account of the political subdivision.

At the outset it must be recognized that it has become a general practice of banks to charge depositors a service fee for the handling of bookkeeping and other expenses incidental to active deposit (checking) accounts. Although a private individual or company may expend money for any purpose not expressly prohibited by law, it is essential to find statutory authority for the expenditure of public money. The principle is firmly established that public officers have only those powers expressly granted by statute, together with such implied powers as are reasonably necessary to effectuate those expressed powers.

The authority granted to political subdivisions in the area of public deposits is found in the Uniform Depository Act, Secs. 135.01 et seq., R.C., Section 2296-1 et seq. G.C. The Uniform Depository Act governs public 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. Section 135.01(B), Revised Code, Section 2296-1, G.C., defines "subdivision" to mean any county, school district, municipality (except municipalities or counties which have adopted a charter under Article XVIII or Article X, Ohio Constitution,) and other district or local authority electing or appointing a treasurer.

With regard to the question of "service charges" assessed by a depository against the active or inactive account of a "subdivision," I would direct your attention to Section 135.22, Revised Code, Section 2296-20, G.C., which reads:

> "Interest on inactive deposits shall be paid by the public depository to the treasurer quarterly, computing the time of payment from the date of deposit, or at any time when withdrawals are made or the account is closed. *No service charge shall be made against any active deposit* or collected from or paid by any treasurer *unless such service charge is the same as is customarily imposed by institutions* receiving money on deposit subject to check, *in the municipal corporation in which the public depository* of such deposit *is located*, in which event the treasurer may pay such charge." (Emphasis added.)

It will be observed that the payment of a service charge from the subdivision treasury is warranted only when prevailing local custom imposes such charges against the accounts subject to check. The law of Ohio, therefore, is clear upon this matter. It was held in Opinion No. 1548, Opinions of the Attorney General for 1937, page 2565, that under Section 2296-20, General Code, now Section 135.22, Revised Code, which became effective April 16, 1937, there is authority only to pay service charges for checks drawn on active deposits held in a bank under depository contract. Under the facts then before the Attorney General, it was further held that there is no authority granted to county officials, including the probate judge, to pay such charges for checks drawn on funds coming into their hands which they have for safe-keeping, but not under depository contract, entrusted to a bank.

Indeed, even before the enactment of the above quoted statute, there were opinions of the Attorney General arriving at similar conclusions. See Opinion No. 3048, Opinions of the Attorney General for 1934, page 1206, and Opinion No. 5659, Opinions of the Attorney General for 1936, page 685.

Assuming that under a given set of facts a charge *is* authorized to be made by the public depository against the subdivision, it is asked whether the charge should be paid from the general funds of the subdivision. I would suppose that in practice, the depository would simply deduct the service charge from the active account of the subdivision. Since the statute authorizes the treasurer of the subdivision to pay the charge where local custom exacts the charge from *other* deposits subject to check, I would conclude that if the depository does not deduct the service charge from the active account, for want of sufficient funds or some other reason, the general fund of the subdivision is the proper source from which payment of the charge should be made. The different types of subdivisions included within the scope of the Uniform Depository Act are several in number, and each might have special funds which are not common to the others, either in purpose or in designation. It would appear, therefore, that the treasurer might lawfully pay the service charge from non-earmarked and unencumbered funds available within the treasury.

Turning now to the other questions relative to a situation wherein a school district bond-issuer has designated a bank as its "paying agent" regarding the payment of principal and interest to the bondholders, I would conclude first, that in the absence of an *agreement* between the school district and the bank, acting as paying agent, a "service charge" may not be made by the agent-bank against the district for the items handled in the Bond and Coupon Account.

In arriving at this conclusion, I rely upon the holding in Opinion No. 1097, Opinions of the Attorney General for 1929, page 1646. In the 1929 opinion it was held as disclosed by the third branch of the syllabus:

> "When municipal bonds are made payable at a specified bank the board of sinking fund trustees of the municipality lawfully may enter into an agreement with the bank for its services made necessary for the redemption of the bonds or interest coupons thereon whether the said bank is located in the municipality or outside the municipality and whether the said bank is the regularly designated depository of the municipality or not."

The facts which gave rise to the 1929 inquiry and opinion failed to disclose an agreement between the board of municipal sinking fund trustees and the bank which provided the services. Accordingly, it was held, as disclosed by the fourth branch of the syllabus of the opinion, that:

> "Unless an agreement is entered into between the board of sinking fund trustees of a municipality and a bank providing for payment to the bank for services rendered by it in connection with the redemption of bonds or interest coupons thereon any services rendered by the bank with reference thereto will be presumed to be gratuitous and it is unlawful for the bank to deduct from moneys in its custody belonging to or accruing to the municipality any charge for such services."

It was mentioned in the opinion that there is no constitutional or statutory inhibition in the statute upon the making of municipal bonds or installments of interest thereon, payable at any place the city authorities may see fit to designate. The same is true with respect to school districts and school bonds. Quite frequently the municipal authorities or school boards anticipate an advantage which might be gained with respect to marketing of bonds by providing that the bonds and interest thereon shall be payable at some particular place or bank other than the treasury of the subdivision issuing the bonds. A city having power to borrow money may make the principal and interest payable where it pleases. Meyer v. City of Muscatine, 68 U. S., 384.

It was further recognized by the author of the 1929 opinion, that where bonds and installments of interest are made payable at some distant bank or place, there might be entailed some expense in making payment. At page 1648 of the opinion of the then Attorney General it was stated as follows:

> "It often happens that bonds and interest coupons are not presented for payment or redemption on the exact day they become due, and it is necessary to provide some means for their payment when presented. It would be practically impossible for a member of a sinking fund commission or its secretary to always be present personally, with the necessary funds to meet such obligations as they arise. No doubt the most practical method of taking care of such matters is to arrange with some bank to do so, and the bank's services may, in my opinion, lawfully be paid for."

With reference to your question concerning the designation of a bank "paying agent" where *no* agreement has been entered into between

the school district bond-issuer and the bank, it must be said that the school district is unauthorized to pay the so-called "service charge" to the bank for the handling of the payment of the bonds. By the same token, neither is the bank authorized to "deduct" from the school district account an amount of money representing a service charge. It is a recognized principle of law that a promise to pay for services rendered to a public corporation or board will not be implied from the mere fact of the rendition of services to the benefit of the public corporation or board. Persons dealing with a public corporation or board do so at their own risk, and are charged with acquainting themselves with the limits of authority and power placed upon the public corporation or board by the law of the jurisdiction. Where a school district designates a given banking institution to serve as its paying agent with regard to the school district's issued bonds, and where no agreement or understanding has been arrived at whereby it is contemplated that the banking institution is to be paid for its services in that regard, the law will not imply a promise to pay that institution for the services rendered it.

I do not consider it proper, nor within the scope of this opinion, to pass upon the question of whether or not a bank which acts as "paying agent" for the school district bond-issues (without an agreement requiring the bond-issuer to pay a "service charge") might lawfully assess the "service charge" against the *bondholder* who makes presentment for payment at maturity. Under the facts as detailed, such a question calls for an opinion concerning the relative rights of a national bank and a private individual.

Focusing attention again upon an assumed state of facts wherein an agreement or understanding had been reached between the school district bond-issuer and its "paying agent" bank requiring the payment of a "service charge" by the school district, it is inquired whether payment therefor might lawfully be made from the "bond retirement fund."

The 1929 Opinion of the Attorney General, supra, held, with reference to a *municipality*, that the broad general authority contained in Section 4517, General Code, for the *trustees of the sinking fund* "to provide for the payment of the bonds issued by the corporation and the interest maturing thereon" was sufficient to permit of payment of *any necessary expense* incidental to the making of the payments and without the necessity of specific legislation therefor. Payment, therefore, was allowed from the sinking fund.

In the field of school districts and school district obligations, there may or may not be a district "sinking fund," depending upon the facts. If the school district has no bonds outstanding which were issued prior to January 1, 1922 (and which were to be retired by means of a sinking fund,) the *treasurer* of the school district has all the powers and functions regarding the purchase and sale of securities. Section 131.22, Revised Code, Section 2295-14, G.C., provides that the treasurer of the subdivision (school district) succeeds to the powers and functions formerly vested in the board of commissioners of the sinking fund of the school district. Section 131.22, Revised Code, concludes as follows:

> " * * * Thereafter all said moneys, securities and assets, all moneys received by the county, municipal corporation, or *school district for the payment of the interest and principal of its bonds* * * *, and all other taxes and revenues which were therefore payable into its sinking fund *shall be paid to its treasurer and placed and held by him in a separate fund to be known as the 'bond payment fund.'* Said fund shall be applied by such treasurer to the purposes for which the sinking fund had theretofore been applicable * * * ." (Emphasis added.)

It will be noted that funds received for the payment of interest and principal of school bonds shall be known as the "bond payment fund" which *shall* be applied by the treasurer to the purposes for which the sinking fund had been held. What are included within these purposes? Section 3315.02, Revised Code, formerly Section 4835, General Code, is part of the "School Funds" chapter, and it provides that the board of education of every district shall provide by tax levy *"for the payment of the annual interest on its bonded indebtedness, for the payment of its serial bonds as they mature,"* and for a sinking fund for the extinguishment of its other bonded indebtedness.

Section 3315.05, Revised Code, Section 4835-3, G.C., provides:

> "The board of education shall appropriate to the use of the sinking fund any taxes levied for the payment of interest on its bonded indebtedness, together with the sum provided for in section 3315.02 of the Revised Code. *Sums so appropriated shall be applied to no other purpose than the payment of such bonds, interest thereon, and necessary expenses of the board of commissioners of the sinking fund."* (Emphasis added.)

I am of the opinion that the board may lawfully pay the "service charge" from the sinking fund or bond payment fund, as the case may be.

I believe authority thereafter may properly be derived from the code sections, supra. If it be admitted that the school district may legally designate a bank as its agent to pay the principal and interest on its bonds at maturity, and further that the school district may pay its agent a service charge in connection therewith, it would appear to follow that such a charge might legally be paid from the sinking fund or bond payment fund, for the reason that payment of the service charge is incidental to payment of the bond obligation and the interest thereon. Those funds are earmarked for the "payment of such bonds, interest thereon, and necessary expenses of the board of commissioners of the sinking fund." The service charge might also conceivably be classed as a "necessary expense" of the board.

It will be recalled that the 1929 Opinion of the Attorney General, supra, in holding that a *municipality* might lawfully pay for services rendered by a bank "paying agent" concerning *municipal* bonds, further held that Section 4517, General Code, contained ample authority to warrant payment of the charge from the municipal sinking fund. Section 4517, General Code, provided simply that "the trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation and the interest maturing thereon." Such language is no more specific than that contained in the school district sections already considered. It appears rather obvious so far as these sinking fund statutes are concerned that the legislature had in mind a fund to be held exclusively for the retirement of the city or school district bond obligations as opposed to being held and used for payment of other city or school district debts or obligations totally unrelated to bond obligations.

In passing, it might be remarked that the school district might legally pay the bank "paying agent" servicing its bonds, from the general funds of the school district as well as from the sinking fund or bond payment fund. There is nothing in the legislative scheme to prohibit payment from such a source.

Accordingly, it is my opinion that pursuant to Section 135.22, Revised Code, Section 2296-20, General Code, a public depository may not make a service charge against an active public deposit nor collect the same from the treasurer of the subdivision making the deposit under depository contract, unless such service charge is the same as is customarily imposed by institutions receiving money on deposit subject to check, in the municipal corporation in which the public depository of such deposit is located; the charge lawfully may be paid from the general funds of the subdivision.

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In the absence of a "service charge" agreement between a school district bond-issuer and a bank designated as the district's "paying agent" concerning the district's bonds, the school district is unauthorized to pay the bank a fee or charge for the services rendered by the bank as "paying agent" for the school district on its bonds.

Respectfully,
C. WILLIAM O'NEILL
Attorney General