

194.

PUBLIC DEPOSITS—POWERS AND DUTIES OF BOARDS OF EDUCATION AND OF TOWNSHIP TRUSTEES IN SELECTING PUBLIC DEPOSITORIES.

SYLLABUS:

1. *A board of education in a school district in which there is no bank or in which there is but one bank, may lawfully contract for the deposit of its funds with any bank conveniently located which, at competitive bidding, offers the highest rate of interest, which must be at least two percent for the full time the funds or any part of them are on deposit, and provides the proper security therefor according to law.*

2. *A board of education, in a school district containing two or more banks, is limited in the selection of its school depository to selecting one of the banks in the district, providing any one of them, at competitive bidding, offers to receive the funds and to pay at least two percent interest for the full time the funds or any part of them are on deposit and to provide security therefor as provided by law, unless, in the opinion of the board of education there has been collusion between the bidders, in which event the board may reject any and all bids and arrange for the deposit of its funds in a bank or banks conveniently located without the district.*

3. *Even though there are two or more banks located within a school district, if none of them at competitive bidding as provided by law, offer to pay two percent interest or more for the school funds of the district, and to secure those funds by the giving of a good and sufficient bond or the deposit of proper security, the board of education of the district may contract for the deposit of its funds with a bank or banks conveniently located without the district which offers, at competitive bidding, to pay the highest rate of interest for those funds, in no case less than two percent, and to properly secure such deposits.*

4. *The determination of whether or not a bank is "conveniently located" to a school district, as that term is used in the school depository law, is a matter purely within the discretion of the board of education in the district and its discretion, in the absence of fraud, collusion or a clear abuse thereof, is final.*

5. *If a board of education, after advertising for bids according to law and making a sincere effort to secure offers from banks qualifying under the law to receive the deposit of the school funds under the board's control, is unable to secure such offers, the city treasurer in a city school district, and for exempted village, village and rural school districts the county treasurer, shall be the custodian of the funds.*

6. *Banks, other than regularly designated public depositories as provided by law, which accept deposits of funds under the control of a board of education or a board of township trustees, with or without an agreement to pay interest thereon or even with the express understanding that no interest will be paid for the use of said funds, are liable to the school district or to the township, as the case may be, for the interest earned and for the profits arising from the deposit of such funds.*

7. *If after the exercise of due diligence, a board of education or a board of township trustees is unable to provide a depository for the funds of their respective subdivisions according to law, such boards can not be held for the penalties pre-*

scribed by sections 7609 and 3326 of the General Code, for failing to provide such depositories.

8. In a township where there is located but one bank, the trustees of the township are limited in awarding a contract for the deposit of its funds to making that award to this bank, providing it agrees to pay at least two percent on daily balances and furnishes proper security for the funds according to law, and is in the opinion of the trustees safe and conveniently located.

9. In a township where there are two or more banks, the trustees shall select as a depository for the township funds, the one which offers to pay the highest rate of interest on daily balances (not less than two percent in any case) and properly secures the funds according to law.

10. When there is no bank located in a township that is willing or able to qualify as a depository for township funds, the trustees may enter into a contract for the depositing of those funds with one or more banks within the county in which the township is located or in an adjoining county thereto, that offers to pay the highest rate of interest on the average daily balances, which in no case shall be less than two percent for the full time the funds are on deposit, and that will properly secure the funds according to law.

11. A board of education or a board of township trustees may permit tax funds to remain in the county treasury, to be drawn by the proper local authorities upon warrants of the county auditor, in sums of not less than one hundred dollars.

12. Boards of education and boards of township trustees have no authority to deposit public funds coming into their respective treasuries, in banks without interest, or in any place or places other than their duly designated public depositories provided according to law.

COLUMBUS, OHIO, March 7, 1933.

HON. JOSEPH J. LABADIE, *Prosecuting Attorney, Ottawa, Ohio.*

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

“I am writing you in behalf of the School Boards and Township Trustees of Putnam County. Several banks in the county have failed and a situation has arisen whereby these public officers cannot obtain 2% interest on their daily balances on any bank in Putnam County. It seems that the banks will not pay interest and they must secure public funds. Will you please advise me whether or not it is permissible for these public taxing officers to secure a depository outside of Putnam County, in an adjoining county if they can secure their funds and obtain 2% interest on daily balances.

Also advise me whether or not it would be legal for them to place their funds on deposit in banks located in Putnam County without receiving interest for same providing said banks secure said public funds as provided by law.”

Your inquiry concerns the powers and duties of boards of education and of township trustees, in selecting public depositories, and involves the consideration of a number of statutory provisions relating thereto. The entire matter is controlled by statute and a different set of statutes controls boards of education and township trustees in providing for the deposit of their funds. I will therefore

Moreover, it will be observed from the provisions of section 7609, *supra*, that a board of education is subject to a penalty if it fails to provide a depository for its funds in accordance with sections 7604, *et seq.*, of the General Code.

Public officers can not be required, however, to do the impossible. Instances have occurred where a board of education after duly advertising for bids and making an honest effort to select a depository for its funds, has been unable to find a bank or banks that could or would qualify to receive the funds, either because of their inability or unwillingness to pay two per cent on daily balances and to provide the proper security for the funds, and it has been held in an opinion of this office found in the Opinions of the Attorney General for 1918, at page 402, that when a school board made an honest effort to establish a depository as provided by section 7604, *et seq.*, of the General Code, but was unable to do so because of lack of proper bids, the members thereof could not be held for the two per cent penalty provided by section 7609, General Code. Under those circumstances it becomes important to determine what may or can lawfully be done with the funds. Sections 4763, 4782 and 4784, General Code, provide as follows:

Sec. 4763. In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all exempted village, village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such district."

"Sec. 4782. When a depository has been provided for the school moneys of a district, as authorized by law, the board of education of the district shall dispense with a treasurer of the school moneys belonging to such school district. The clerk of the board of education of such district shall perform all the services, discharge all the duties and be subject to all the obligations required by law of the treasurer of such school district."

"Sec. 4784. If for any reason, a depository in such district ceases to act as custodian of the school moneys, they shall be placed in the custody of the treasurer of the city or county in which the school district is located as provided in section 4763. Such moneys shall be held and disbursed by the treasurer in all respects as required by law until another depository is provided for such moneys. Thereupon he shall place such money in the depository and his duties and obligations relating thereto shall then cease."

The first sentence of section 4763, General Code, seems, on its face, to be in conflict with section 4782, General Code. It has been held, however, in the light of the history of this legislation that:

"When a depository has been provided by a city board of education for its school funds, as authorized by law, the board of education of the district must dispense with its treasurer, and the clerk of the board of the city school district performs all of the services and duties of such treasurer." Opinions of the Attorney General for 1915, page 71.

See also Opinions of Attorney General for 1922, at page 74.

It seems clear from the provisions of sections 4763 and 4784, *supra*, that, when for any reason a depository for school funds is not provided, the funds

should be left in the custody of the city or county treasurer as the case may be, and that it is not proper or legal for a board of education, under those circumstances, to deposit its funds in a bank without interest. In fact, if that is done, the bank receiving such funds becomes liable to the school district for any profits accruing to the bank from the use of the funds, regardless of its agreement upon receiving the deposit. *Franklin Bank vs. Newark*, 96 O. S., 453.

In an opinion of this office found in the Opinions of the Attorney General for 1918, at page 1043, it is held:

"1. Where a board of education has advertised and used every effort to obtain bids for deposits, and such board has been unable to secure bids, the city treasurer of the city district, and in a rural and village district the county treasurer, shall be the custodian of the board of education funds.

2. If the funds of a city district were left in the custody of a city treasurer and the funds of a rural district were left in the custody of the county treasurer, the boards of education of such district are legally entitled to receive the depository interest or any profits arising from the deposit of such funds by such officials.

3. Banks which accept deposits, even though they refuse to bid, are liable for the interest earned and for the profits arising from the deposit of such funds."

Upon consideration of the terms of sections 7605, 7606 and 7607, *supra*, it seems clear that boards of education are limited in the selection of a depository bank, to the selection of a bank within the school district, if two or more banks are located in the district and one of them bids at least two per cent for the funds and offers proper security therefor, except when, in the opinion of the board, there has been collusion between the bidders.

If less than two banks exist within a school district, the board of education of the district is authorized to enter into a contract with one or more banks, as depository banks, that are *conveniently located* and offer the highest rate of interest, without any limitation as to their location. The determination of whether or not a bank is conveniently located, if circumstances are such that such a bank may be selected, is purely within the discretion of a board of education and the board is not limited in that determination to the selection of a bank within the county or even within the state. In an opinion of a former Attorney General it was held:

"It is within the discretion of the board of education to determine when banks are 'conveniently located' within the meaning of section 7607, General Code, and the Bureau of Inspection and Supervision of Public Offices can not control such discretion except in case of fraud, collusion or clear abuse of such discretion.

The phrase 'conveniently located', as used in section 7607 can not be defined so as to apply to all cases. It should be considered in connection with the particular circumstances of each case." Opinion of Attorney General for 1918, page 402.

It was also held in an opinion reported in the published opinions of the Attorney General for 1927, at page 1143, that:

"1. A board of education in a school district containing two or more banks has no authority to select as its depository bank a bank located outside the state of Ohio unless after advertising for bids for the carrying of depository accounts the board should determine that there has been collusion between the bidders, in which event it may reject any and all bids and arrange for the deposit of its funds in a bank or banks that are conveniently located without the district either within or without the state. Such bank so selected must conform to the provisions of law with reference to the payment of interest and the furnishing of proper security.

2. A board of education in a school district containing less than two banks is empowered to enter into a contract for the deposit of its funds with one or more banks located either within or without the state of Ohio. Such bank must have been determined by said board of education to be conveniently located, and must upon competitive bidding offer the highest rate of interest of any of the banks entering into such competition. Such interest shall not in any case be less than 2% for the full time the funds or any part thereof are on deposit, and such bank must furnish proper security as provided by law."

My predecessor in an opinion which dealt with the question of the selection of a depository for funds in excess of the amount which a regular school depository may receive by reason of the limitations contained in section 7604, *supra*, held:

"When a board of education has contracted with a bank in the district for the deposit of its school moneys and the said bank is not qualified under the law to receive on deposit all the moneys coming into the hands of the treasurer of the school district, and there is no other bank in the district willing to receive said moneys, furnish the proper security therefor and pay at least two per cent interest on said deposit, the said board of education may lawfully contract with a bank outside the district and conveniently located, which offers the highest rate of interest, not less than two per cent, and furnishes the proper security for the deposit of the district's surplus moneys over and above what may be deposited in its regular depository." Opinions of Attorney General for 1931, page 257.

In the last opinion referred to, it was said:

"The apparent purpose of the provisions of section 7607, General Code, *supra*, to the effect that where a school district contains less than two banks, depository contracts may be made with other banks conveniently located, is to insure competition for the school funds of a district and to make provision that the school district shall receive interest on its funds to the extent of at least two percent to the end that the district may secure the best possible contract for the deposit of its school moneys, and obviously, even if there are two banks in a district and they refuse to bid, or are not qualified for any reason to receive the funds of the district, or are not able to furnish the proper

security for those funds, the board of education of the district has no other alternative than to fall back on the provisions of section 7607, General Code, and make depository contracts with some bank conveniently located that will bid at least two percent for those funds and properly secure them as provided by law."

With respect to the deposit of township funds, your inquiry calls for the consideration of sections 3316-1, 3320, 3322, 3323, 3324 and 3326 of the General Code. These sections, as they now exist, were all enacted in the same act of the legislature (110 O. L. 30). It will not be necessary for the purposes of this opinion to quote all these sections. Sections 3322 and 3323 of the General Code are controlling, in so far as the geographical location of the bank or banks to be selected as township depositories is concerned.

Section 3320, General Code, provides in mandatory language that township trustees shall by resolution provide for the deposit of any and all the moneys coming into the treasuries of their townships, and that they shall deposit such moneys "in such bank, banks or depository within the county in which the township is located as they may direct, subject to the following provisions." This general provision as to a depository "within the county" is modified somewhat by more specific "following provisions" contained in section 3323, General Code, as will hereinafter appear.

Section 3316-1, General Code, provides that upon the establishment of a township depository, in accordance with sections 3320 et. seq., General Code, the township treasurer shall be dispensed with.

Section 3326, General Code, provides for penalizing township trustees who fail to provide a township depository according to law. It has been held by this office in Opinion No. 4094, rendered under date of February 26, 1932, that township trustees do not become liable for the penalty imposed by section 3326, General Code, for their failure to provide a township depository, if after due diligence they are unable to do so. This conclusion is based on the same principle referred to in other opinions with respect to boards of education which have been noted above. In the course of the 1932 opinion the Attorney General said:

"Since such section is a penal statute, and requires a strict construction, and further, since it is one of the presumptions of our legal system that the law does not require the performance of the impossible, is it not also a reasonable inference that the legislature did not intend to inflict a penalty of two percent upon the township trustees who had exerted every effort to provide a depository for township funds which would meet the requirements laid down by the legislature? I do not believe that the purpose of the legislature was otherwise than to provide for the safekeeping of township funds, nor do I believe that it had any purpose to require the payment by township trustees of a penalty on funds that could not possibly be deposited in accordance with the legislative requirements."

Section 3321, General Code, provides as to what shall be contained in the resolution of a board of township trustees in providing for a depository and that the contract with such depository shall be let upon competitive bidding and that all proceedings with reference to the matter shall be conducted in

such manner as to insure full publicity. It further provides that no contract for the deposit of township funds shall be made for a longer period than two years. Sections 3322 and 3323 of the General Code provide as follows:

"Sec. 3322. In townships containing two or more banks, such deposits shall be made in the bank or banks situated in the township that offer at a competitive bidding the highest rate of interest on the average daily balance on such funds, which in no case shall be less than two per cent for the full time the funds are on deposit. Such bank or banks shall give a good and sufficient bond to be approved by the township trustees, for the safe custody of such funds in a sum at least equal to the amount deposited. No bank or depository shall receive a larger deposit of such funds than the amount of such bond and in no event to exceed three thousand dollars. The trustees of the township shall see that a greater sum than that contained in the bond is not deposited in such bank or banks, and such trustees and their bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

"Sec. 3323. In a township in which but one bank is located, and the location thereof is convenient, the funds of the township shall be deposited in such bank at a rate of interest not less than two per cent on the average daily balance, but when the trustees have reason to believe that such bank is not a safe depository, or when the location thereof is inconvenient or when such bank refuses to pay at least two per cent interest, or where there are two banks in a township and either one or both refuse to pay at least two per cent interest on such deposits, or in a township in which no bank is located, after the adoption of a resolution providing for the deposit of its funds, the trustees may enter into contract with one or more banks within the county, or in a county adjacent to the county of which the township is a part, that are conveniently located and which offer the highest rate of interest on the average daily balance, and which in no case be less than two per cent for the full time the funds are on deposit."

It will be observed from the terms of section 3322, *supra*, that when there are two or more banks in a township and any one or more of them offer *at competitive bidding* to pay at least two percent interest on township funds and to furnish proper security for such funds, the township trustees shall award the funds to the bank offering to pay the highest rate of interest. By the terms of section 3323, General Code, it is clear that, if there is one bank only, in a township, and that bank is conveniently located and in the opinion of the trustees is safe, and it is willing to pay at least two percent on the daily balances and properly secure the funds, that bank shall be selected as the township depository.

Regardless of the number of banks located in a township, if none of them bids at least two percent for township funds, the award of the funds is controlled by section 3323 of the General Code. It seems clearly to have been the intention of the legislature, as expressed in section 3323, General Code, that if any bank in a township offers to pay at least two percent for the township funds, and no other bank in the township offers to pay more, the award shall be made to that bank, unless the trustees have reason to believe that such bank is unsafe

or that its location is inconvenient, but if no bank within the township qualifies as a township depository, a bank or banks outside the township may be selected.

The only instance in which township trustees may select a depository outside the township is when there is no bank located in the township, which in the opinion of the trustees is safe and conveniently located, that will agree to pay at least two percent interest on the average daily balances and to furnish proper security for the funds, according to law. If there is no such bank in the township, the trustees may select a bank located outside the township, but are in so doing limited to the selection of a bank or banks "within the county, or in a county adjacent to the county of which the township is a part, that are conveniently located and which offer the highest rate of interest on the average daily balances and which in no case be less than two percent for the full time the funds are on deposit."

If no bank located in the township or county or in the county adjacent to the county of which the township is a part, is willing to pay at least two percent for the township funds and provide proper security for the deposit of those funds, the trustees are confronted with the question of what to do with the funds.

It is held in Opinion No. 4094, hereinbefore referred to, that:

"The board of township trustees, when unable to procure a greater rate of interest from a depository, may not legally contract with a depository for the deposit of township funds at a lesser rate than two percent."

There is no specific statutory direction as to what shall be done with township funds when no depository is established, as there is with respect to school district funds in sections 4763 and 4782, General Code.

Provision is made by statute, however, which sanctions the practice of allowing township funds, or funds of a municipality or school district, to remain in the county treasury and to be drawn therefrom by the proper local authorities on the warrant of the county auditor, in sums of not less than one hundred dollars.

Township trustees who are unable to provide a depository for the township funds may by force of these statutes, leave their funds in the county treasury and draw them as they need them in sums not less than one hundred dollars, or they may hold the funds in their own safe. This latter practice is, in most cases, not advisable. They have no authority to deposit these funds in a bank without interest or in any other manner than by the selection of a regular depository in the manner provided by law. Any bank receiving them otherwise will be held to account for interest and profits arising from their use. The statutes authorizing local subdivisions to leave funds in the county treasury and draw them out as they need them are sections 2690 and 2692 of the General Code, which read as follows:

"Sec. 2690. If a township treasurer or other proper officer so requires, or the trustees of a township, the council of a city, village, or the board of education of a school district, respectively, so direct, such moneys shall remain in the county treasury, to be drawn by the proper treasurer on the warrant of the county auditor, in sums of not less than one hundred dollars."

"Sec. 2692. When the local authorities by resolution so request the county auditor shall draw, and the county treasurer shall pay on such

draft to township, city and village treasurers, and the treasurer of any board of education and the treasurer of any other political subdivision or taxing district whose funds derived from taxes or other sources are payable by law to the county treasurer any money that may be in the county treasury to the accounts of such local authorities respectively and lawfully applicable to the purposes of the current fiscal year in which such request is made; provided that the county auditor and treasurer shall retain any amounts that may be needed to make such payments of the obligations of the local political subdivisions or taxing districts as are required by law to be paid directly by the county authorities."

Specifically, in this connection, it is my opinion that:

1. A board of education in a school district in which there is no bank or in which there is but one bank, may lawfully contract for the deposit of its funds with any bank conveniently located which, at competitive bidding, offers the highest rate of interest, which must be at least two percent for the full time the funds or any part of them are on deposit, and provides the proper security therefor according to law.

2. A board of education, in a school district containing two or more banks, is limited in the selection of its school depository to selecting one of the banks in the district, providing any one of them, at competitive bidding, offers to receive the funds and to pay at least two percent interest for the full time the funds or any part of them are on deposit and to provide security therefor as provided by law, unless, in the opinion of the board of education there has been collusion between the bidders, in which event the board may reject any and all bids and arrange for the deposit of its funds in a bank or banks conveniently located without the district.

3. Even though there are two or more banks located within a school district, if none of them at competitive bidding as provided by law, offer to pay two percent interest or more for the school funds of the district, and to secure those funds by the giving of a good and sufficient bond or the deposit of proper security, the board of education of the district may contract for the deposit of its funds with a bank or banks conveniently located without the district which offers, at competitive bidding, to pay the highest rate of interest for those funds, in no case less than two percent, and to properly secure such deposits.

4. The determination of whether or not a bank is "conveniently located" to a school district, as that term is used in the school depository law, is a matter purely within the discretion of the board of education in the district and its discretion, in the absence of fraud, collusion or a clear abuse thereof, is final.

5. If a board of education, after advertising for bids according to law and making a sincere effort to secure offers from banks qualifying under the law to receive the deposit of the school funds under the board's control, is unable to secure such offers, the city treasurer in a city school district, and for exempted village, village and rural school districts the county treasurer, shall be the custodian of the funds.

6. Banks, other than regularly designated public depositories as provided by law, which accept deposits of funds under the control of a board of education or a board of township trustees, with or without an agreement to pay interest thereon or even with the express understanding that no interest will be paid for the use of said funds, are liable to the school district or to the township, as the

case may be, for the interest earned and for the profits arising from the deposit of such funds.

7. If after the exercise of due diligence, a board of education or a board of township trustees is unable to provide a depository for the funds of their respective subdivisions according to law, such boards can not be held for the penalties prescribed by sections 7609 and 3326 of the General Code, for failing to provide such depositories.

8. In a township where there is located but one bank, the trustees of the township are limited in awarding a contract for the deposit of its funds to making that award to this bank, providing it agrees to pay at least two percent on daily balances and furnishes proper security for the funds according to law, and is in the opinion of the trustees safe and conveniently located.

9. In a township where there are two or more banks, the trustees shall select as a depository for the township funds, the one which offers to pay the highest rate of interest on daily balances (not less than two percent in any case) and properly secures the funds according to law.

10. When there is no bank located in a township that is willing or able to qualify as a depository for township funds, the trustees may enter into a contract for the depositing of those funds with one or more banks within the county in which the township is located or in an adjoining county thereto, that offers to pay the highest rate of interest on the average daily balances, which in no case shall be less than two percent for the full time the funds are on deposit, and that will properly secure the funds according to law.

11. A board of education or a board of township trustees may permit tax funds to remain in the county treasury, to be drawn by the proper local authorities upon warrants of the county auditor, in sums of not less than one hundred dollars.

12. Boards of education and boards of township trustees have no authority to deposit public funds coming into their respective treasuries, in banks without interest, or in any place or places other than their duly designated depositories provided according to law.

Respectfully,

JOHN W. BRICKER,

Attorney General.

195.

CONSTITUTIONAL LAW—PUBLIC ACCOUNTANCY BILL CONSTITUTIONAL.

SYLLABUS:

Senate Bill No. 242 of the 90th General Assembly relating to the practice of public accountancy held constitutional.

COLUMBUS, OHIO, March 8, 1933.

HON. HAROLD G. MOSIER, *Chairman, Judiciary Committee, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your request for my opinion as to the constitutionality of Senate Bill No. 242, copy of which is attached to your request.