

OPINION NO. 82-082**Syllabus:**

1. The General Assembly may create custodial accounts which are maintained by the Treasurer of State but are not part of the state treasury for purposes of appropriation as provided for by Ohio Const. art. II, §22.
2. The Treasurer of State has no duty or authority to examine the propriety of vouchers presented for payment by an officer, board or commission which has been authorized to approve expenditures from custodial accounts.
3. The Treasurer of State may not charge a fee for services performed with regard to custodial accounts unless there is express statutory authorization for such charge or authority implied from an express power.

To: Gertrude W. Donahey, Treasurer of State, Columbus, Ohio
By: William J. Brown, Attorney General, October 26, 1982

I have before me your request for my opinion concerning your duties and authority with regard to custodial accounts. I have summarized your questions as follows:

1. Are custodial accounts part of the state treasury for purposes of appropriation as provided for by Ohio Const. art. II, §22?
2. If not, what are the rights, duties and responsibilities of the Treasurer of State as custodian?
3. May the Treasurer of State charge a reasonable fee for the services performed as custodian?

Ohio Const. art. II, §22 states: "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years." Your office recognizes the fact that the General Assembly has created numerous funds with the intention that they be held by the Treasurer of State as custodian and that they not be considered part of the state treasury. See, e.g., R.C. 145.26 (public employees retirement system); R.C. 3307.12 (state teachers retirement); R.C. 4141.09 (unemployment compensation). You ask whether the legislative act of creating custodial accounts to be maintained by the Treasurer of State outside the state treasury, subject to

expenditure without appropriation, violates Ohio Const. art. II, §22.¹

Courts have consistently upheld the constitutionality of statutes unless they are unconstitutional beyond a reasonable doubt. See State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955); Williams v. Scudder, 102 Ohio St. 305, 131 N.E. 481 (1921). Although Ohio courts have not specifically ruled on the question you have asked, they have recognized that the Treasurer of State does, in fact, hold some moneys which are not part of the state treasury and which, therefore, do not require an appropriation prior to expenditure. See State ex rel. Rothbacher v. Herbert, 176 Ohio St. 167, 198 N.E.2d 463 (1964); In re Appeal of Ford, No. 81 AP-680 (Ct. App. Franklin County, June 15, 1982); see also 1980 Op. Att'y Gen. No. 80-044; 1931 Op. Att'y Gen. No. 3486, vol. II, p. 1040; 1939 Op. Att'y Gen. No. 720, vol. I, p. 884 (once moneys in the depository trust fund are paid in to the state treasury they may be returned to the rightful owner only in pursuance of a specific appropriation). I must conclude, therefore, that the General Assembly may create funds which are deposited with the Treasurer of State but which are not included within the state "treasury" as that term is used in Ohio Const. art. II, §22.

In further support of this conclusion, I have noted that certain courts of other states have specifically found that not all moneys deposited with the treasurers of their states are included within the "state treasuries" for purposes of constitutional provisions similar to Ohio Const. art. II, §22. In 1974 Op. Att'y Gen. No. 74-102, I discussed those decisions at 2-417-18 as follows:

This distinction was considered by the Supreme Court of Washington in State, ex rel. State Employees' Retirement Board v. Yelle, 201 P. 2d 172 (1948). The question with which the Court was concerned was whether the repayment of a separating member's contribution could be made from the State Employees' Retirement Fund, which is subject to the control and management of the Retirement Board, in the absence of an appropriation. The respondent State Auditor contended that any such refund would be in violation of the Washington Constitution, which provides that no moneys shall be paid out of the treasury of the state, or out of any of its funds except pursuant to appropriation. The relator Retirement Board, on the other hand, contended that the funds of the retirement system are not public funds within the meaning of the Washington Constitution, but are proprietary funds committed to the custody of the state treasurer as trustee for particular objects and purposes, and are subject to disbursement solely upon authorization of the retirement board, without an appropriation by the legislature.

In holding for the relator Retirement Board, the Court stated as follows at p. 178-79:

¹You have also asked about your duties with respect to the "state depository trust fund." R.C. 131.04 provides, that "[f]or the purpose of providing a method to properly collect, deposit, and audit contingent receipts received by various state departments, there is hereby created the 'state depository trust fund' of which the treasurer of state shall be the custodian." I note that the state depository trust fund is unlike other custodial accounts maintained by your office in that it is expressly made part of the state treasury. R.C. 131.06. The legislature qualifies that statement later in R.C. 131.06 by recognizing that moneys in the depository trust fund are not in the state treasury in the sense that they are not state moneys until they accrue to the state and are paid in to the treasury through the auditor of state. Until such time as contingent receipts in the depository trust fund are paid out or are transferred in to the state treasury they are treated like moneys in other custodial accounts in that they are not subject to appropriation and may be paid out absent a warrant issued by the Auditor of State. R.C. 131.06. The distinction between the state depository trust fund and other custodial accounts maintained by your office is, however, insignificant for the purposes of this opinion, and my analysis applies with equal force to the state depository trust fund.

"The state, in the exercise of its police powers, can provide by legislative act that all funds coming into the hands of the state treasurer shall become state funds, but the legislature may, in its discretion, also provide for collection and administration of certain funds without making them state or public funds.

"The legislature, in creating a state employees' retirement system, had the power to elect to create a fund for that purpose either by creating a state fund to be kept in the state treasury under the control of the state treasurer and the state auditor and disbursable only in pursuance of an appropriation, or by creating a special fund, of a proprietary nature, designed to meet specific objectives, and to be placed in the custody of the state treasurer acting ex officio as a member of the retirement system, rather than in his constitutional capacity, and to be expended as directed by the legislature without a specific appropriation.

"The mere fact that the state treasurer may be made the custodian of a particular fund and may be required to render certain services with respect to such fund does not, of itself, make moneys, so received and held by him 'state funds in the state treasury' within the meaning of the constitutional requirement that such funds be disbursed only on appropriation.

"The legislature has the authority to determine the nature, place, and character of custody and requisites for expenditure of a fund created by it, except in cases where the constitution requires moneys to be paid into the state treasury."

Of similar import is Pensioners Protection Ass'n. et al., v. Davis, 150 P. 2d 974 (1944), wherein the Supreme Court of Colorado held at p. 976 as follows:

"The term 'public funds' means funds belonging to the state, and the term does not apply to special funds, which are collected or voluntarily contributed, for sole benefit of the contributors and of which the state is merely the custodian."

Note that the foregoing cases use the term "public funds" to mean "state funds." Nevertheless, they hold that not all moneys held in the state treasury are monies of the state. See also State, ex rel. Stearns v. Olson, 195 N.W. 714 (1919); Allen et al. v. City of Omaha, 2286 N.W. 916 (1939); State, ex rel. St. Louis Police Relief Ass'n. v. Igoe, 107 S.W. 2d 929 (1937).

Your second question asks for a description of your rights and duties as custodian of special funds. It is my understanding that your specific concern is with your ability to perform a pre-audit type function. You ask whether the procedure in R.C. 113.06 which is followed for payments made from the state treasury includes payments from custodial accounts. R.C. 113.06 states: "No money shall be paid out of the state treasury or transferred from it to a county treasury or elsewhere except on the warrant of the auditor of state." Since I have concluded that not all moneys held by the Treasurer of State are in the state treasury for all purposes, I must determine whether the legislature has intended to include custodial accounts within the treasury for purposes of R.C. 113.06. The Treasurer of State is directed to make payments from many special accounts upon presentation of a voucher submitted and authorized by a particular officer, board or commission. See, e.g., R.C. 145.26 (payments from the public employees retirement system shall be made only upon vouchers authorized by the public

employees retirement board); R.C. 3307.12 (payments from the state teachers retirement system shall be made only upon vouchers authorized by the state teachers retirement board), R.C. 4141.09 (payments from the unemployment compensation fund shall be made only upon vouchers authorized by the fund administrator). The specific language of statutes requiring payment by the Treasurer from certain funds upon mere presentation of a properly approved voucher indicates that those funds are not to be included within the state treasury as that term is used in the more general statute, R.C. 113.06. R.C. 1.51.

You have asked whether you have a duty to examine vouchers which are presented for payment without a warrant of the Auditor. A warrant ordering payment from the state treasury may be issued only after the Auditor of State has examined the propriety of such payment. This requirement is set forth in R.C. 115.35 which reads, in part:

The auditor of state shall examine each voucher in excess of three hundred dollars presented to him, or claim for salary of an officer or employee of the state, or per diem and transportation of the commands of the national guard, or judgment against the state pursuant to Chapter 2743. of the Revised Code, and if he finds it a valid claim against the state and legally due and that there is money in the state treasury appropriated to pay it, and that all requirements of law have been complied with, he shall issue a warrant on the treasurer of state for the amount found due, and file and preserve the invoice in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal and that there is money in the treasury which has been appropriated to pay it. The auditor of state may examine any voucher presented to him which is less than three hundred dollars and take whatever action is authorized under this section with respect to such vouchers.

If the Auditor is not required to issue a warrant for the payment of a particular expenditure because the funds from which payment is made are not included in the state treasury for purposes of R.C. 113.06, no examination is made pursuant to R.C. 115.35. Had the General Assembly intended that the treasurer's office examine those vouchers which are presented for payment absent a warrant and prior examination by the Auditor of State, it could easily have enacted a statute similar to R.C. 115.35. Since the legislature did not do so, I must assume that it did not intend for the Treasurer of State to make such an examination.²

Your final question asks whether the Treasurer may charge fees for services performed with respect to custodial accounts. As a constitutional officer, the Treasurer of State has only such powers as are expressly conferred by the Constitution and statutes and such implied or incidental powers as may be necessary to carry into effect those expressly conferred. See State ex rel. Trauger v. Nash, 66 Ohio St. 612, 64 N.E. 558 (1902); 1958 Op. Att'y Gen. No. 1868, p. 157. There is no general express or implied grant of power permitting the Treasurer of State to charge fees for services rendered for custodial accounts. Whether charges may be made against any particular custodial accounts depends upon the statutes

²I note, however, that one Ohio Court has held that it would not compel by mandamus a county treasurer to pay warrants drawn on an emergency fund while injunction suits against such payment are pending, even though no restraining order had been issued. As to the Payment of Warrants on Emergency Levies, 20 Ohio N.P. (n.s.) 233 (C.P. Brown County 1917). Thus, although you have no duty to perform a pre-audit examination, if there is reason to believe that payment would be illegal, you have the authority to refuse to make such payment.

controlling those accounts.³ See 1927 Op. Att'y Gen. No. 272, vol. I, p. 469 (the state is not obligated to bear the costs of administering the state workers compensation fund); see also 1982 Op. Att'y Gen. No. 82-011 (charges by county commissioners to public offices may be made only pursuant to express statutory authority or authority implied from an express power).

Based on the foregoing, it is my opinion, and you are advised, that:

1. The General Assembly may create custodial accounts which are maintained by the Treasurer of State but are not part of the state treasury for purposes of appropriation as provided for by Ohio Const. art. II, §22.
2. The Treasurer of State has no duty or authority to examine the propriety of vouchers presented for payment by an officer, board or commission which has been authorized to approve expenditures from custodial accounts.
3. The Treasurer of State may not charge a fee for services performed with regard to custodial accounts unless there is express statutory authorization for such charge or authority implied from an express power.

³The current General Assembly has provided that some special funds bear a portion of the cost of the performance of centralized services. See, e.g., Am. Sub. H.B. 694, section 91 (workers' compensation fund), section 92 (liquor control fund), section 93 (state lottery fund) (uncodified), 114th Gen. A. (1981) (eff. Nov. 15, 1981). "Centralized services" as defined in section 99 (uncodified) of Am. Sub. H.B. 694 are "all services provided by the Attorney General, Auditor of State, and any other agency receiving General Revenue Funds providing such services" and would include those performed by your office.