

OPINION NO. 76-053

Syllabus:

1. Moneys paid by a board of education into the salary escrow account under R.C. 3307.51 as amended by Am. Sub. H.B. 268, effective August 20, 1976 are subject to the provisions of R.C. Chapter 135 in respect to active deposits. Any interest arising from such deposit shall, under terms of R.C. 135.21, be credited to the general fund of the board of education.

2. Moneys deposited into the salary escrow account mandated by R.C. 3307.51 as amended by Am. Sub. H.B. 268 effective August 20, 1976, may properly be expended only for the purpose therein set forth. Deposit of such moneys into any other account from which expenditures for other purposes may be made does not comply with the requirement of R.C. 3307.51.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, August 12, 1976

I have before me your request for my opinion in respect to the recent changes affecting R.C. 3307.51 concerning teacher contributions to the state teachers retirement system. As you note in your request, Amended Substitute House Bill 268, effective August 20, 1976, amends these provisions. Your questions read as follows:

1. May those monies paid into the salary escrow account be invested by the school district in accordance with the provisions of the Uniform Depository Act, Chapter 135, Revised Code. If it is determined that such monies paid into the salary escrow account may be invested by the school district, must the interest earned from such investments be credited to the general fund of the school district or must the interest remain in the salary escrow account for the benefit of the teachers?
2. For the purposes of Section 3307.51, Revised Code, may the existing payroll clearance accounts as provided by Section 3315.08 be used as the "salary escrow account?"
3. If number 2 is answered in the negative, will those monies so deposited into a salary escrow account pass beyond the control of the school district? That is,

may such escrowed funds be withdrawn from the salary escrow account by the school district and encumbered for other uses if assurances are given that the escrow account would be later reimbursed?

Based on the following analysis it is my opinion that moneys paid into a salary escrow account pursuant to R.C. 3307.51 may be deposited as "active" deposits under R.C. Chapter 135, with interest earned on such deposits credited to the general fund of the school district. However, moneys required to be paid under R.C. 3307.51 into a salary escrow account may not be paid into a payroll clearance account under R.C. 3315.08 and may not be withdrawn or encumbered for uses other than contributions required under R.C. 3307.51.

R.C. 3307.51 provides for teacher contributions to the state teacher retirement system. Prior to the recent enactment of Am. Sub. H.B. 268, R.C. 3307.51 specified that each teacher who is a member of the retirement system would contribute eight percent of his compensation to the teachers saving fund and that such contribution was to be deducted by the employer on each payroll in an amount equal to the applicable percent of such contributors' earned compensation for such payroll period or other period as the state teachers retirement board may approve.

From information you have supplied, it is my understanding that several questions in respect to the deductions authorized by R.C. 3307.51 have arisen in light of the amendment of R.C. 3307.01 by H.B. 1034, effective September 26, 1974, which altered the definition of "year" for the purposes of the state teachers retirement system. Prior to the enactment of H.B. 1034, "year" was defined as the year beginning the first day of September and ending with the thirty-first day of August next following. H.B. 1034 altered this definition to provide that "year" for this purpose would mean the year beginning the first day of July and ending with the thirtieth day of June next following.

Since all teacher compensation is earned during the teaching year itself, the change of the end of the year to June 30 for purposes of contributions to the retirement system raised a number of questions in respect to when deductions for this purpose were to be made in the usual situation where a teacher is not in the classroom during the months of July and August but receives paychecks therein.

Am. Sub. H.B. 268, effective August 20, 1976, amends the provisions of R.C. 3307.51 to specify that all contributions to the state teachers retirement system are to be deducted by the end of the year, which as defined by R.C. 3307.01(Q), is the year ending the thirtieth day of June. In pertinent part, the amendment of R.C. 3307.51 provides as follows:

"Such contribution shall be deducted by the employer on each payroll in an amount equal to the applicable percent of such contributors' PAID compensation for such payroll period or other period as the state

teachers retirement board may approve, PROVIDED ALL CONTRIBUTIONS ARE DEDUCTED BY THE END OF THE YEAR. EACH SCHOOL DISTRICT SHALL ESTABLISH A SALARY ESCROW ACCOUNT AND PAY INTO SUCH SALARY ESCROW ACCOUNT THE DIFFERENCE, IF ANY, WHICH MAY EXIST BETWEEN COMPENSATION EARNED BY A TEACHER DURING A PAYROLL PERIOD AND THE COMPENSATION PAID TO THE TEACHER FOR THE PAYROLL PERIOD. TEACHERS' CONTRIBUTIONS ON COMPENSATION EARNED IN ONE YEAR, BUT PAID IN A SUBSEQUENT YEAR, SHALL BE PAID TO THE TEACHERS SAVINGS FUND FROM THE SALARY ESCROW ACCOUNT ESTABLISHED PURSUANT TO THIS SECTION, AND SHALL NOT BE WITHHELD FROM PAYROLLS DURING THE YEAR IN WHICH THE COMPENSATION WAS EARNED BUT NOT PAID. DEDUCTIONS FROM PAYROLL FOR CONTRIBUTIONS UNDER THIS SECTION DURING ANY ONE PAYROLL PERIOD SHALL NOT EXCEED EIGHT PERCENT OF THE COMPENSATION PAID FOR SUCH PAYROLL PERIOD...."

(Capitals indicate new material;
underlining added for emphasis.)

It is necessary to evaluate your questions in light of these additions to R.C. 3307.51. The amendment to this section alters the previous provisions of R.C. 3307.51, which did not require any specific earmarking of monies deducted from compensation for contribution to the teachers saving fund. The amendment of this section, however, requires the establishment of a salary escrow account.

Under the terms of R.C. 3307.51, each school district shall establish such a salary escrow account and shall pay into it any difference which may exist between compensation earned and compensation paid, with all contributions to the teachers saving fund to be made by the end of the year, June 30. The purpose of the escrow account appears to be that of guaranteeing the availability of moneys which represent contributions deducted from the compensation earned by members of the state teachers retirement system prior to the end of the fiscal year.

With this purpose in mind, I turn to your specific questions concerning the investment and use of moneys placed in the salary escrow account under R.C. 3307.51.

Under the provisions of R.C. 3313.51, the clerk of the board of education in every school district shall serve as treasurer of school funds. R.C. 3313.51 further specifies that all moneys received by the clerk shall be placed by him in a depository designated by the board of education in compliance with the provisions of R.C. Chapter 135, the Uniform Depository Act. R.C. 135.01 defines three categories of deposits: active, inactive and interim. The moneys deposited into the salary escrow account mandated by the amendment of R.C. 3307.51 do not meet the criteria set forth by R.C. Chapter 135 in respect to interim or inactive deposits. In the case of payments to the salary escrow account made near the end of the school year, the payment of funds from that account to the teachers saving fund will occur within

a few weeks of placement in the salary escrow account. It seems clear under the definition of R.C. 135.01 that contributions to the salary escrow account established by R.C. 3307.51 must be treated as active deposits.

There is no authority under the provisions of R.C. Chapter 135 for the "investment" of funds constituting an active deposit, insofar as "investment" implies that funds invested are in some way encumbered or unavailable. As discussed by one of my predecessors in 1964 Op. Atty. Gen. No. 962, active deposits are incompatible with any sort of time deposit arrangement. It is, therefore, my opinion that moneys placed in the salary escrow account mandated by R.C. 3307.51 must be in compliance with the general provisions of R.C. Chapter 135 in respect to active deposits.

Insofar as a board of education, acting as a governing board as defined by R.C. 135.01, and the clerk of such board, acting as the treasurer of school funds, may make such an active deposit the subject of an interest bearing account, R.C. 135.21 applies to specify the apportionment of any interest earned.

R.C. 135.21 provides that interest earned on undivided tax funds shall be apportioned pro rata among the separate funds or taxing districts in the proportion to entitlement to distribution of the undivided tax funds. This section further provides for pro rata apportionment of interest earned where a treasurer is acting ex officio in a custodial capacity for funds which do not belong in the treasury of the subdivision.

Under the terms of R.C. 135.21, however, all other interest earned shall be credited to the general fund of the subdivision or local authority to which the principle sum belongs. Moneys placed in a salary escrow account pursuant to R.C. 3307.51 are neither undivided tax funds nor custodial funds. Such moneys do not comprise a separate fund and any interest earned thereon as the result of active deposit in a salary escrow account must be credited to the general fund of the school district.

In your second and third questions, you refer to the provisions of R.C. 3315.08 and inquire whether the special payroll account authorized thereunder may be used as the salary escrow required by the amendments to R.C. 3307.51 and whether "escrowed" funds may be encumbered for other uses. R.C. 3315.08 specifies that the salaries of all employees and officers of the board of education may be paid in such a manner as the board may authorize. To this end, the board is specifically authorized to establish a special payroll account in depositories upon such terms as to interest on daily cash balances and under such other conditions as the board may prescribe. When such accounts are established, the board may establish procedures for drawing against the special payroll accounts by check of the treasurer.

The amendment of R.C. 3307.51 by Am. Sub. H.B. 268 specifically requires the creation of a salary escrow account. While "escrow" in this provision is not defined, an exploration of traditional principles of escrow and escrow accounts as utilized statutorily leads to the conclusion that moneys

placed in the salary escrow account may be expended only for the purpose for which the fund was created - payment to the teachers savings fund. The purpose of the special payroll accounts authorized by R.C. 3315.08 is to facilitate direct payment of the salaries of all employees and officers of the school board. Moneys required by 3307.51 to be placed in a salary escrow account for the purpose of guaranteeing the availability of moneys representing contributions deducted from compensation earned by members of the state teachers retirement system would, if deposited in the special payroll accounts authorized by R.C. 3315.08, be subject to expenditure for a purpose other than that mandated by R.C. 3307.51.

Historically, the concept of escrow centered upon the deposit with a third party stranger to a particular transaction of deeds and other written instruments for subsequent delivery. An instrument cannot be said to be delivered in escrow and does not constitute an escrow where possession of the depository is subject to the control of the depositor. Farley v. Palmer, 20 Ohio St. 223 (1870). Although the depositor's right of possession may return if the specified event does not occur, it is essential that the deposit of the instrument be irrevocable in the meantime. The technical concept of escrow did not historically apply to a deposit of money. However, it has been held that the legal effect of such a deposit will be the same. Standard Asbestos Mfg. Co. v. Fulton, 53 Ohio App. 279 (1935). More recently, the deposit of funds in an escrow account pending adjudication has been statutorily authorized in Ohio in the areas of landlord-tenant relationships, R.C. 1923.061, and title insurance agent's authority in respect to escrow funds, R.C. 3953.23.

While neither the historical, technical definition of escrow nor those statutorily set forth in other contexts are controlling in respect to the amendment of R.C. 3307.51, the use of that term in mandating that salary escrow accounts be established necessarily implies a distinct limitation upon funds deposited therein. Moneys so deposited may not properly be made into an account from which other expenditures may be made.

In answer to your specific questions, it is my opinion, and you are so advised that:

1. Moneys paid by a board of education into the salary escrow account under R.C. 3307.51 as amended by Am. Sub. H.B. 268, effective August 20, 1976 are subject to the provisions of R.C. Chapter 135 in respect to active deposits. Any interest arising from such deposit shall, under terms of R.C. 135.21, be credited to the general fund of the board of education.
2. Moneys deposited into the salary escrow account mandated by R.C. 3307.51 as amended by Am. Sub. H.B. 268 effective August 20, 1976, may properly be expended only for the purpose therein set forth. Deposit of such moneys into any other account from which expenditures for other purposes may be made does not comply with the requirement of R.C. 3307.51.