

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-860 was overruled in part by 1960 Op. Att'y Gen. No. 60-1202.

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FAILURE OF COUNTY COMMISSIONERS, ACTING AS GOVERNING BOARD, TO COMPLY WITH PROVISIONS OF SECTION 135.07, R.C., DOES NOT INVALIDATE BOARD'S DESIGNATION OF PUBLIC DEPOSITORIES OF COUNTY FUNDS. COUNTY TREASURERS—REQUIRED TO DEPOSIT ACTIVE AND INACTIVE FUNDS IN DESIGNATED DEPOSITORIES. SECTIONS 135.01, 135.08, 135.10, 135.23, R.C. OHIO CONSTITUTION. ACT. VIII, SEC. 2e.

SYLLABUS :

1. The failure of the county commissioners, acting as the governing board, to comply with the provisions of Section 135.07, Revised Code, does not invalidate the board's designation of public depositories of county funds when all of the eligible institutions have made application therefor as provided in Sections 135.08 and 135.10, Revised Code, and a memorandum of agreement for depositories has been signed by each of the institutions selected and by the county commissioners acting as the governing board.

2. The county treasurer is not required to sign the memorandum of agreement for depositories designating a depository for county funds.

3. The county treasurer is required to deposit active and inactive funds in the designated depositories even though the contracted rate of interest thereon is lower than the current rate of interest being paid by such depositories to their regular depositors.

4. The governing board may order the county treasurer to invest excess public moneys in bonds, notes, certificates of indebtedness, treasury bills or other securities issued by and constituting direct obligations of the United States, or obligations of the State of Ohio issued pursuant to the authority of Section 2e, Article VIII, Ohio Constitution, only when after compliance with Sections 135.01 to 135.23 inclusive, of the Revised Code, the amount of public moneys belonging to the county exceeds the maximum limitations of its eligible public depositories.

Columbus, Ohio, October 9, 1959

Hon. James W. Freeman, Prosecuting Attorney
Coshocton County, Coshocton, Ohio

Dear Sir :

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

“The Treasurer of Coshocton County has requested that I obtain your opinion on the following :

“Does failure of the Board of County Commissioners to comply with the provisions of Section 135.07 R.C. of Ohio invalidate subsequent designations of public Depositories? The Board of Commissioners of Coshocton County, Ohio did not comply with any of the provisions of Section 135.07 R.C. However, each eligible institution in Coshocton County did, prior to the date fixed by Section 135.11 R.C. make application in writing to the Board of County Commissioners for Designation as Depositories as required by law.

“Subsequently a Memorandum of Agreement for Depositories was executed by each of said eligible institutions on Form Aud. 512-G as to active and inactive funds. The Treasurer of Coshocton County has not executed this Memorandum of Agreement. After receipt of the several Memoranda, the Board of County Commissioners by resolution accepted said Memoranda as executed (apparently this was supposed to constitute a Designation of Depository).

“Do the curative provisions of Section 135.13 R.C. validate said Designations of Depositories in view of the noncompliance by the Board with Section 135.07 R.C.? Is the signature of the Treasurer a prerequisite to validity? The Treasurer objects to the depositing of inactive funds in local Depositories at 2% interest when said local Depositories have an advertised rate of 2½% interest to the public. He further objects to the acceptance of 2% interest from local Depositories when U. S. Government obligations are paying 3½ to 4%.

“Being mindful of your predecessors 1958 Opinion No. 1899, I have advised the Treasurer that where inactive funds are concerned, it would seem that the Board of County Commissioners are required to deposit all of said inactive funds with local Depositories provided said local Depositories make proper application for and can legally accept said funds regardless of the rate of interest.”

Provisions regulating deposits of public moneys are found in Chapter 135., Revised Code. Section 135.01, Revised Code, includes as “public moneys” all moneys of a subdivision of the state, such as a county. Various other terms are also defined, such as “governing board” which in the case of a county means the board of county commissioners.

Section 135.04 sets forth the eligibility requirements of a public depository including the maximum limit of inactive deposits it may receive.

Section 135.07, Revised Code, requires the county commissioners, as the governing board of the county, to estimate the aggregate maximum amount of public funds subject to its control to be awarded and on deposit

as inactive funds. A copy of the board's resolution is to be published for two consecutive weeks together with a notice of the date on which the governing board will meet to designate public depositories and the period for which inactive deposits will be awarded. These requirements, you indicate, were completely ignored by the county commissioners.

The requirements of Section 135.07, Revised Code, appear designed to give all eligible depositories opportunity to bid for public deposits and thereby obtain for the county the highest possible rate of interest. In the situation outlined in your request such notice would have accomplished nothing for the reason that each eligible institution made application to become a public depository as required by law for each such institution has joined with the governing board in executing a memorandum agreement for depositories as to both active and inactive funds. Section 135.13, Revised Code, provides in part:

"The designation of an institution as a public depository by any governing board constitutes an acceptance of the offer embodied in the application of such institution to the extent of the award made and creates an obligation upon the board to cause public moneys of the state or subdivision to be deposited in and withdrawn from such depository during the period of designation, in accordance with sections 135.01 to 135.23, inclusive, of the Revised Code. Such obligation shall be evidenced by a written memorandum in such form as is prescribed by the bureau of inspection and supervision of public offices, signed by the chief officer and secretary of the board and by an executive officer of the institution. In case of any conflict between the terms of such memorandum and those of the application and the designation, or when, through inadvertence or otherwise, such written memorandum has not been executed or is not available, the terms of the application and the designation shall constitute the terms of such obligation. Performance of such obligation may be enforced by any appropriate action."

"* * *"

The provisions of the above section show that when your county commissioners, acting as the governing board, accepted the memoranda of the applicant depositories, these acceptances constituted designations of the applicant institutions as public depositories. The signature of the county treasurer is not required by the statutes. Section 135.11, Revised Code, referring to the board's designation of depositories says:

"* * * Such designation and award shall be made in duplicate; one copy shall be retained by the governing board of the subdivision and one copy shall be certified to the treasurer."

“* * *”

The treasurer's duties in respect of depositories are set forth in Section 135.15, Revised Code, reading 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.”

Under the somewhat similar wording of former Section 2736, General Code, it was held in *State ex rel. The Second National Bank of Warren, v. Harkelrode, Treasurer*, 34 Ohio Appellate 279 that:

“1. Section 2736, General Code, requires the county treasurer to deposit the county money in a bank, or banks, or trust company, as directed by the commissioners, and designated as inactive or active depositories of the funds of the county.”

As was said by Judge Pollock in the above opinion, “It would be futile for the Legislature to require the commissioners to award the funds of the county to the bank making the highest bid therefor, to the amount of that bank's bid, and then permit the treasurer to use his discretion in depositing the money belonging to the county.”

Section 135.08, Revised Code, requires each eligible institution desiring to be a public depository of inactive deposits to make application for such designation to the governing board, specifying therein the maximum amount the applicant desires to receive as an inactive deposit. Section 135.09, Revised Code, referring to the governing board then says in part:

“* * * Such board shall award the inactive deposits of public moneys subject to its control to the eligible institution which offers to pay the highest rate of interest on such deposits permissible at the commencement of the period of designation, in the amount, as to each, specified in the application of the institution therefor. If two or more eligible institutions offer to pay the same permissible highest rate of interest on amounts so specified, which in the aggregate exceed the estimated amount to be deposited at the beginning of the period, or the maximum amount thereof subject to deposit at any time during such period, the inactive deposits

shall be divided and awarded among such eligible public depositories in proportion to their respective capital funds. * * *

“In the making and maintaining of inactive public deposit accounts, the public depositories offering to pay the highest permissible rate of interest shall be preferred. * * *”

Comparable provisions for institutions desiring to be public depositories of active funds are found in Section 135.10, Revised Code, except that references to the rate of interest which the applicant will pay are omitted. An application for active funds may be combined with an application for inactive funds. The foregoing provisions make it apparent that the rate of interest to be paid by depository institutions is determined solely by the bidding therefor and is in no manner controlled or determined by the current rate of interest paid to local depositors.

Coming to your last question respecting the apparent desire of the treasurer to invest inactive funds in United States government obligations bearing a higher rate of interest than that bid by the successful depositories, I find the only exception to the requirement that both active and inactive funds be deposited with designated depositories is in Section 135.12, Revised Code, the third paragraph of which reads as follows:

“If, after compliance with sections 135.01 to 135.23, inclusive, of the Revised Code, requiring the deposit of public moneys in public depositories, the amount of public moneys of the state or of a subdivision is in excess of the aggregate amount of such deposits, and the board finds that such excess cannot be deposited in public depositories because of the limitations of such sections, such board may order the treasurer to invest any part of such excess in bonds, notes, certificates of indebtedness, treasury bills, or other securities, issued by and constituting direct obligations of the United States, or obligations of the state of Ohio issued pursuant to the authority of Section 2e, Article VIII, Ohio Constitution, provided that only such obligations as will mature or are redeemable at the option of the holder within two years from the date of purchase shall be eligible securities for such investments. Any order of the board directing the treasurer to invest public moneys shall specifically state the amount of public moneys to be invested and shall specifically describe the securities to be acquired.”

The reluctance of the legislature to permit investment of county funds in United States obligations may be inspired in part at least by the possibility of market losses. In the fourth paragraph of Section 135.12, Revised

Code, the board is given authority to order the treasurer to sell securities on a fixed date. The sale must be made for cash "at the then current price." It is further provided that "neither the treasurer nor the members of the board shall be held accountable for any loss occasioned by sales of securities at prices lower than their cost. Any loss or expenses incurred in making such sales shall be payable as other expenses of the treasurer's office." Thus the gain in interest rate might be offset if the securities should have to be sold at a time when the market was down. The same general conclusion was reached by my predecessor as shown in Opinion No. 1899, Opinions of the Attorney General for 1958. In the third paragraph of the syllabus of that opinion he reached the conclusion that:

"3. Until the board of county commissioners has exhausted the possibility of obtaining depositories for surplus funds in its hands, it is without authority to invest the same in securities as provided in Section 135.12, Revised Code."

It thus seems very clear that the power of a county treasurer to invest in securities of the United States or the State of Ohio is strictly limited by the provisions of Section 135.12, Revised Code.

Answering your question specifically it is my opinion that:

1. The failure of the county commissioners, acting as the governing board, to comply with the provisions of Section 135.07, Revised Code, does not invalidate the board's designation of public depositories of county funds when all of the eligible institutions have made application therefor as provided in Sections 135.08 and 135.10, Revised Code, and a memorandum of agreement for depositories has been signed by each of the institutions selected and by the county commissioners acting as the governing board.

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the United States, or obligations of the State of Ohio issued pursuant to the authority of Section 2e, Article VIII, Ohio Constitution, only when after compliance with Sections 135.01 to 135.23, inclusive, of the Revised Code, the amount of public moneys belonging to the county exceeds the maximum limitations of its eligible public depositories.

Respectfully,

MARK McELROY

Attorney General