

87.

EXAMINER OF SUPERVISION OF PUBLIC OFFICES—WARRANTED IN MAKING JOINT AND SEVERAL FINDING FOR MISFEASANCE IN OFFICE, WHEN—AGAINST ALL PERSONS RESPONSIBLE—FUTURE CREDITS.

SYLLABUS:

An examiner operating under the Bureau of Inspection and Supervision of Public Offices, is fully warranted in making a finding against all persons, severally and jointly, guilty of misfeasance in office, which misfeasance results in a loss of public funds.

Under such circumstances the examiner should make a flat finding against the person or persons for the amount of shortage without reference to possible future credits.

COLUMBUS, OHIO, February 4, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: I am in receipt of your communication of recent date, as follows:

“We are enclosing herewith letter from our Examiner in charge of examination of the City of Uhrichsville, in which is set forth a statement of fact in regard to the selection of the Union Bank as depository for the general city funds, as well as the bond retirement funds, the latter being under control of the Sinking Fund Trustees of said city. Also, the balances in said Union Bank of Uhrichsville, now closed, that were standing to the credit of several city accounts, are noted in the Examiner’s letter.

Under the conditions surrounding the selection of said depository bank, may we respectfully inquire if our Examiner would be authorized in returning a finding for recovery against the City Treasurer for the amounts standing to the credit of general city funds, with the provision that any payments that may be received from said bank be credited against such finding; and would our Examiner be authorized in returning a finding for recovery against the Sinking Fund Trustees for the amount of funds remaining in said bank to the credit of the bond retirement fund, because of their failure to comply with the provisions of section 4515 ad 4516 of the General Code, relative

to the selection of a depository, with a like provision that any payment by the bank should be credited against such finding?"

I likewise note the following enclosures:

"The Union Bank, Uhrichsville, Ohio, which is now in process of liquidation by the Federal Deposit Insurance Corporation, was closed October 27, 1936, with the following public funds on deposit:

J. Bruce Greenlee, City Treasurer.....	\$5,305.74
Sinking Fund Trustees	5,522.21
Bond and Coupon Account	207.57

The Union Bank owns three City of Uhrichsville Eastport Ave. Special Asmt'. bonds of \$1,371.59 each, or a total of \$4,114.77, due October 1, 1937, 1938 and 1939, which no doubt will be applied as a set-off against the sinking fund deposits.

As to the selection of the Union Bank as Depository for the public funds, the council records January 2, 1934, show "Motion by Westhafer and seconded by Mr. Green, that the Union Bank of this City be named depository for city funds. All members answered 'yes' as the roll was called; 'Motion carried.'

There was no notice by publication or letter, inviting bids, no bid was received, no depository contract entered into and the Bank failed to furnish the City with security other than the Federal Deposit Insurance.

The records of the sinking fund trustees show that after notice by letter to the Union Bank only, inviting a bid for a depository, the bid of the Union Bank of 1/10th of one per cent per annum was accepted December 5, 1935, for a period of three years. According to the bid the bank was to furnish U. S. Government Bonds as security.

No security was furnished other than Federal Deposit Insurance.

In a letter from James E. Markham, Counsel for the Federal Deposit Insurance Corporation, addressed to Charles E. La Porte, City Solicitor, December 30, 1936, Mr. Markham reached the tentative conclusion that all of these funds must be added together and treated as a single deposit of the City of Uhrichsville and protected by insurance up to the maximum of \$5,000.00.

In case Mr. Duffy, Attorney General, should take the same stand as his predecessor on this question, the City Solicitor will

use the opinion in arguing the question with the Counsel for the F. D. I. C.

My question is whether it would be advisable to return a finding for recovery against the city treasurer and in favor of the city treasury for \$5,305.74, and state that any amounts received from the federal deposit insurance and dividends from liquidation of the Bank, should be applied against the finding, or should I show the balance due from the Union Bank of \$5,305.74, and not make any finding?

While the depository was not selected legally by the council, it was as a result of said action of council that the treasurer deposited the public funds at said Bank, and this fact, in my opinion, would seem to partly relieve the treasurer from liability for any loss.

In the case of the sinking fund trustees, it appears that the Union Bank was selected as Depository in the manner provided by Section 4515 and 4516 G. C., with the exception that notice inviting bids was sent to the United Bank only, and therefore, not on a competitive basis, and the Sinking Fund Trustees failed to demand from the Bank security in sufficient amount in excess of the federal deposit insurance to properly protect the sinking funds.

It therefore appears that the sinking fund trustees have not exercised due care in selecting the Union Bank as Depository, and should a finding for recovery be made against the sinking fund trustees, jointly and severally, and in favor of the sinking fund and the bond and coupon account for the above amounts, and the collection of any federal deposit insurance or dividends to be applied against the findings?

In Attorney General's Opinion No. 7, dated January 17, 1927, it was held as follows:

'The council of a village cannot by any action relieve the trustees of the village sinking fund from responsibility for losses occasioned by reason of their failure to require a proper bond from the depository which they have selected for the deposit of the funds of the village.'

I adhere to the former opinion of this office rendered January 17, 1927, Opinions of the Attorney General, Vol. 1, page 10.

Section 286, General Code, reads in part, as follows:

"No claim for money or property found in any such report (meaning report of state examiner) to be due to any public

treasury or custodian thereof in any such report shall be abated or compromise either before or after the filing of civil actions by any board or officer or by order of any court unless the attorney general shall first give his written approval thereof."

This section is so clear that it needs no interpretation. In this case the examiner is fully warranted in making a finding against all the parties named jointly and severally inasmuch as they failed to follow the law provided for the awarding of public funds to depositaries and because of their failure to follow the law these funds were lost to the city treasury and sinking fund. The unlawful action of the city council in selecting a depository would in no wise relieve the city treasure, as it was his duty so see and know that the depository law had been followed before delivering the funds thereto.

It would seem to me that the examiner has performed his full duty when he makes the flat findings without borrowing trouble as to future credits. That is a question for the party or parties against whom the finding is made.

The question of set-off as between the City of Uhrichsville and The Union Bank is not involved in the Bureau's examination and it would seem to me that the examiner is not expected, and certainly not required to deal in anticipations.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

88.

APPROVAL—CANAL LAND LEASE TO LAND IN CITY OF
BARBERTON, SUMMIT COUNTY, OHIO.

COLUMBUS, OHIO, February 4, 1937.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, OHIO.*

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a certain canal land lease in triplicate executed by the State of Ohio, through you as Superintendent of Public Works and as Director of said department, to the city of Barberton, Summit County, Ohio. By this