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ADJUTANT GENERAL — DUTIES — CERTAIN MONEYS — STATE DEPOSITORY TRUST FUND — STATE MILITARY FUND — GENERAL FUND — STATE TREASURY — MAINTENANCE, OHIO NATIONAL GUARD FUND — OHIO GUARDSMAN — GIFTS.

SYLLABUS:

Duties of the adjutant general with reference to certain moneys received by him discussed.

Columbus, Ohio, August 22, 1942.

Hon. Joseph T. Ferguson, Auditor of State,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

“An examination of the accounts of the Adjutant General’s Department discloses that various donations received by the State for specific purposes are on deposit as a part of the funds in the State Depository Trust Fund, credit of the Adjutant General’s Department.

In one case, certain merchandise was donated to the State to be used for flood relief in 1937. The merchandise was not used for this purpose, but was subsequently sold by the Adjutant General’s Department, and the proceeds deposited as above noted. The question has now arisen as to the ownership of this money, whether it should be returned to the donor, or whether the State has such title to the fund as would justify its transfer into the State Treasury.

The examination also discloses that an account is carried on the records of the above department entitled: ‘The Ohio Guardsman’. There is to the credit of this account, and on deposit as a part of the funds to the credit of the Adjutant General, State Depository Trust Fund, certain revenues which have accrued from the publication of a magazine known as the Ohio Guardsman, and labeled as the official publication of the Ohio National Guard and Naval Militia and published under the direction of the Adjutant General. The publication of this magazine, however, was suspended sometime ago, and the question has now arisen as to the disposition of the remaining revenues. Your opinion is desired as to whom these revenues now belong and what the law provides or requires in

reference to the proper disposition of the foregoing revenues.

At various times in the past, a portion of the revenues resulting from the operation and maintenance of military property under the control of the Adjutant General has been deposited in the State Depository Trust Account to the credit of the Adjutant General's Department, and withdrawals have been made on requisition of the Adjutant General, and used to meet contract obligations incurred directly by the above department for services rendered, or merchandise furnished to the Department.

We desire your opinion as to whether the above procedure is lawful, and in conformity with the provisions of law in reference to receipt and disbursement of the above revenues, or should the money be deposited in a special fund in the State Treasury, and disbursed in accordance with legislative appropriation."

The so-called "state depository trust fund" mentioned in your request is authorized to be created by Sections 24-3, 24-4 and 24-5 of the General Code. Such sections read:

Section 24-3.

"For the purpose of providing a method of properly collecting, depositing and auditing of 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."

Section 24-4.

"Every state officer, state institution, department, board, commission, college or university, receiving fees or advances of money, or who, under the provisions of section 24 of the General Code, collect or receive fees, advances, or money, shall deposit all such receipts to the credit of the state depository trust fund, herein created, when such receipts may be subject to refund or return to the sender; or when such receipts have not yet accrued to the state. Such deposits shall be made within 48 hours of their receipt, in case of offices, institutions, departments, boards and commissions located at Columbus, and within six days, in case such office, institution, department, board or commission is not located in Columbus."

Section 24-5.

"The financial officer or chief of each state office, institution, department, board or commission receiving contingent

money shall open a separate or individual account with the depository trust fund in the state treasury in the name of his division. Withdrawals of money from the state depository trust fund shall be made by requisition on the treasurer of state as custodian of the depository fund by the authorized official of the office or department wherein the receipt originated and such requisition shall show the purpose of the withdrawal and such other information as the treasurer of state may require; and the authorized official of the office or department wherein the receipt originated shall draw a requisition or revenue voucher on his balance in the state depository trust fund for the amount accruing to the state and pay it in to the state treasury through the auditor of state, in compliance with section 248 of the General Code. * * *

It will be observed that funds received by state officers, boards, etc., are authorized to be placed in such fund under two circumstances only. viz.:

1. When such receipts may be subject to refund or return to the sender: or
2. When such receipts have not yet accrued to the state.

When funds are received by a state officer, department or board under any other circumstances, their disposition is controlled by the provisions of Section 24 of the General Code, to supplement which such sections were enacted in 115 O.L., 533. Such Section 24 of the General Code reads in part as follows:

“On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. * * *

When we construe such sections in the light of each other, they being in *pari materia*, we find that they require every state officer and department to pay to the treasurer of state “on or before Monday of each week” all moneys, checks and drafts “received for the state, or for the use of any such state officer, * * * department, * * * during

the preceding week” from any source whatsoever, but that only when such moneys are subject to refund to the sender or have not yet accrued to the state they are authorized to be placed in the “depository trust fund.”

With regard to that part of your inquiry which makes reference to the proceeds derived from the sale of merchandise donated for use in the alleviation of distress during the flood of 1937, it should be borne in mind that while Section 18 of the General Code grants specific authority to the State of Ohio to accept gifts for its benefit or for the benefit of any of those under its charge and to hold and apply the same according to the terms of the gift, however, neither in that section nor in any other section of the General Code do I find any grant of authority to a state officer or department to so accept and dispose of such gifts. I must therefore assume that such donation was made to and accepted by the state as distinguished from the department of the adjutant general.

With reference to the funds in such account to which you refer as being credited to the “Ohio Guardsman” account, which funds you state accrued from the publication of a magazine known as the “Ohio Guardsman” formerly published under the direction of the adjutant general, in examining the statutes with reference to the powers and duties of the adjutant general, I failed to discover any grant of power to such official to engage in the publication of any magazine. However, since you state that the publication of such magazine has been discontinued, I express no opinion concerning the legality of such former conduct.

You further refer to the fact that moneys derived from the operation of property under the control of the adjutant general have been deposited in such “depository trust fund” and expended therefrom in payment of contractual obligations incidental to the operation of the adjutant general’s department.

It must be borne in mind that a public official, being the incumbent of an office created by statute, has such powers and duties as have been conferred upon him by the statutes creating such office, and that when he attempts to exercise powers beyond those so granted to him, his acts are void and of no effect.

Sections 5235 and 5236 of the General Code grant to the adjutant general the power to condemn and sell military stores belonging to the state when they have become unserviceable. Section 5236 of the General Code requires "the sums realized from the sales thereof, to be turned into the state treasury, to be credited to any fund appropriated for the use of the Ohio national guard * * * as determined at the time by the adjutant general."

Section 5247 of the General Code provides for the creation of the "state military fund" in the state treasury and reads:

"The auditor of state shall credit to the 'state military fund' from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the national guard and naval militia. It shall not be diverted to any other fund or used for any other purpose."

Section 5248 of the General Code divides the "state military fund" into two sub-funds as follows:

"The general assembly shall appropriate annually, and divide into two funds, the amount authorized by the preceding section. Such funds shall be respectively known as the 'state armory fund' and 'maintenance Ohio national guard fund.'"

Section 5249 of the General Code specifies the purposes for which such funds, when created in the state treasury by appropriation of moneys therefor by the general assembly, may be used. Such section reads:

"From the 'maintenance, Ohio national guard fund' the adjutant general shall pay all expenses incident to the maintenance of the various units of the national guard and Ohio naval militia, except such as are provided for from the 'state armory fund'. From the 'state armory fund' the adjutant general shall provide grounds, armories and other buildings for military purposes by leasing, purchasing or constructing the same."

Section 5239 of the General Code authorizes the adjutant general to accept gifts for military purposes, but specifically provides that when received they shall become the property of the State of Ohio. Such section reads:

“He may receive gifts or donations of land, money or other property for the purpose of aiding in the acquisition of grounds or the purchase, building, furnishing or maintaining of an armory or other building for military purposes. All lands so acquired shall be deeded to the state of Ohio, and all property received under the provisions of this section from any source, shall become the property of the state.”

Section 5221 of the General Code grants authority to the adjutant general to construct improvements and to change improvements on military property of the state, but limits the use of the revenue and receipts therefrom and directs that they be placed in the fund in the state treasury, created under authority of Section 5248 of the General Code, above quoted, known as the “maintenance, Ohio national guard fund.” Such section reads:

“The adjutant general may make such changes and improvements in existing roadways and otherwise in such range and ground as the needs of the state and the exigencies of the service may require. All improvements made upon the lands of such park belonging to the state, from moneys received from any source, shall become the property of the State of Ohio. All revenue and receipts therefrom, or from any other military property in the State of Ohio, not made a portion of the company, troop, battery or other organization funds by regulations, shall be credited to the fund hereinbefore specified as ‘Maintenance, Ohio National Guard.’”

Since the sections above quoted direct that the revenue and receipts received from the sale of property no longer usable by the national guard, or from the operation of improvements located on state military property be paid into the state treasury as therein designated, and further provide that all gifts received by the adjutant general are the property of the state and if in the form of money, it would appear that the provisions of Section 24 of the General Code require all moneys derived from the sources mentioned in your inquiry to be paid into the state treasury and not into the “state depository trust fund” authorized by Sections 24-3, 24-4 and 24-5 of the General Code.

It would further appear that when moneys are so paid into the state treasury they may be withdrawn therefrom to the extent only that the general assembly has appropriated such funds as provided in Section 22 of Article II of the Ohio Constitution which reads:

“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.”

Specifically answering your inquiries, it is my opinion that the Ohio statutes require that all of the moneys mentioned in your inquiry be paid into the state treasury rather than deposited in the “state depository trust fund,” and then credited to the proper funds as designated by the statutes above quoted; but when not so designated, credited to the “general fund.”

. Respectfully,

THOMAS J. HERBERT
Attorney General.