

## **Opinion No. 62-71**

June 15, 1962

**BY:** OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

**TO:** Mr. Robert D. Castner, State Auditor, State Capitol, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. Do the several Boards of County Commissioners have the unequivocal authority and responsibility to act as the County Board of Finance?
2. Are the County Boards of Finance the sole authorities within their respective counties to determine which banks are to be designated as the official depositories of county funds and if more than one bank in each county is so designated to then determine the distribution of deposits between such banks?
3. What forms of collateral and what amount of collateral need be given by banks to qualify as depository banks?
4. Are "School Activity Funds" of the public schools considered to be public funds so as to require that they be deposited in the same manner as other public funds?

#### CONCLUSIONS

1. Yes.
2. Yes, but see analysis.
3. See analysis.
4. Yes.

### **OPINION**

#### ANALYSIS

All four of the questions propounded deal with matters of public money and particularly with the authority, responsibility and powers of County Boards of Finance. The basic statutory law in the area is compiled as Section 11-2-1, et seq, N.M.S.A., 1953 Compilation.

Pursuant to the provisions of Section 11 - 2 - 4, N.M.S.A., 1953 Compilation the Board of County Commissioners of the respective counties are designated as the County Boards of Finance and their authority and duties are therein described. Implicit in that statutory authorization is the element of control over all public moneys of the subject counties. The element of control must be emphasized in view of the fact that actual custody of the public moneys is given to the County Treasurer. It should be noted, however, that the County Treasurer acts in a purely ministerial capacity and can only deal with such moneys in the manner prescribed by the County Board of Finance. See Attorney General Opinion No. 60-163 issued September 20, 1960. Subject to the provisions of statutory law the Boards of County Commissioners have the exclusive authority and responsibility to act as the County Boards of Finance, the only limitations upon their authority being those imposed by statute. It might be pointed out that among those statutory limitations is Section 11-2-22, N.M.S.A., 1953 Compilation, which permits the State Board of Finance to regulate by general regulation or by special orders the safe-keeping of collateral delivered by depository banks as securities for deposits of state money.

Your second question queries the power of the County Board of Finance to exclusively determine which banks are to be designated as official depositories of county funds. An affirmative answer to this question is demanded by Section 11-2-4, N.M.S.A., 1953 Compilation, and the reasons for such answers are substantially explained in the answer to your first question. While the last mentioned section indicates that the county treasurer of such county shall have supervision of the deposit of public moneys, you will note that the county treasurer acts "by and with the advice and consent of the respective boards of finance."

The selection of banks to receive the public moneys of the counties is a power specifically granted to the boards of finance by Section 11-2-4, supra. In this regard see also Attorney General Opinion No. 59-4 issued January 26, 1959.

With regard to the distribution of deposits between two or more designated depository banks within a given county we direct your attention to Sections 11-2-33 and 11-2-35, N.M.S.A., 1953 Compilation. The former section provides in pertinent part that:

". . . public moneys so deposited shall be equitably distributed between all of the banks within the county so qualifying, upon the basis of the relative capital stock and surplus of such banks. . . ."

The latter section provides in part as follows:

"When two (2) or more banks shall qualify under the provisions of this act as depositories of the public moneys of any county . . . the treasurer having the custody of such moneys shall deposit the same in the several banks so qualifying, in the proportion that the amount for which such bank shall have qualified bears to the aggregate amount for which all of said banks shall have so qualified. . . ."

The two quoted sections place rather strict limitations on the treasurers of the County Boards of Finance in distributing public moneys between qualified banks. It would be an abuse of discretion for such boards to distribute such funds in a manner not consistent with the statutory dictate.

In answer to your question regarding collateral which must be given by banks in order to qualify as depositories of county funds, we refer you to Sections 11-2-17 and 11-2-18, N.M.S.A., 1953 Compilation, (P.S.). We understand that you are concerned with both the type of collateral permitted and the amount required. Section 11-2-17, supra, declares that no moneys shall be deposited in any bank until such bank is qualified to receive deposits of public money by depositing collateral securities or by giving bond. There are certain exceptions to this rule but they are not pertinent to this discussion. The same section of the statute provides that a designated bank may qualify by giving a bond or bonds in such sums as may be determined by the proper treasurer or board of Finance. Such bond or bonds must be approved by the District Judge of the District within which such county is located, as well as by the appropriate county board of finance. The statute also provides that such bond or bonds must be in an amount equal to the amount of money to be deposited in such bank by the county. The county is prohibited from depositing an amount of money in excess of the penal amount of bond or bonds.

Section 11-2-18, N.M.S.A., 1953 Compilation (P.S.) provides an alternative method of qualifying whereby a designated bank may deliver securities of the type described in said section to the appropriate county board of finance. The statute requires that these securities have "an aggregate market value equal to the amount of public moneys said bank desires to receive on deposit." The same section further provides that before accepting bonds or certificates of the type described, as security for public moneys, the proper board of finance must pass upon the validity and value of such securities. Section 11-2-18, supra, provides in considerable detail the securities which are acceptable; which types may be accepted at their par value, and which types may only be accepted at their actual market value. The statute is extensive and clear and does not require lengthy quotation in this opinion.

You will note from reading the subject section that counties are prohibited from depositing public moneys in an amount exceeding the value of securities so deposited. By way of concluding this discussion of collateral it can clearly be said that the county boards of finance are designated as the deciding authority in evaluating collateral. However, they are subject to the supervisory control of the proper District Judge when the collateral security is in the form of surety bonds as provided in Section 11-2-17, supra. In no event should deposits exceed the face value of the security given by the depository bank.

In the event that securities for deposits become insufficient at any time, the board of finance may within its discretion require that additional securities be furnished for deposits of public moneys. Section 11-2-21, N.M.S.A., 1953 Compilation.

Nothing stated herein should be construed as being contrary to the opinion expressed by this office in an informal opinion dated September 22, 1961, addressed to the Assistant District Attorney in Lovington, New Mexico. The problem then being considered involved the selection of checking depositories for moneys of Lea County. The author of the opinion concluded in part as follows:

"As we view Section 11-2-33, N.M.S.A., 1953 Comp., the act of consenting and advising with the county treasurer on the designation of checking depositories is, in our opinion, a ministerial duty on the part of the board of county commissioners . . . (We) are of the opinion that the duty placed upon the county commissioners under Section 11-2-33, supra, does not require the exercise of discretion or judgment. When the county treasurer submits the name or names of banks to act as checking depositories the only duty which the county commission has is to determine whether these banks are qualified depositories as required by statute. When this determination has been made by the commission it is our view that they must approve the banks as checking depositories."

Your last question deals with moneys which you have designated as "School Activity Funds". While these funds are not specifically dealt with by the statutes they are clearly "public moneys" within the intent of Sections 11-2-1, et seq., since they are impressed with public interest. Even though such funds may be derived from private sources they are in the hands of public officers and are designed for public use. See Attorney General Opinion No. 62-9 issued January 19, 1962. Since these funds constitute public moneys they are subject to the same requirements regarding deposits in banks as are other public funds. It would be administered and controlled by the appropriate boards of finance in this regard. See Section 11-2-6, N.M.S.A., 1953 Compilation, dealing with boards of finance for institutions including boards of education and Section 11-2-4, N.M.S.A., 1953 Compilation which has been previously referred to herein. All boards of finance have substantially the same powers and authorities and these powers and limitations have been discussed in some detail in earlier portions of this opinion. We shall discuss these matters in greater detail at such time as more specific problems present themselves.