

## Opinion No. 33-636

August 10, 1933

**BY:** E. K. NEUMANN, Attorney General

**TO:** Honorable Clinton P. Anderson, State Treasurer, Santa Fe, New Mexico.

{\*70} Regarding your letter of August 5th, 1933, with reference to the amount of money which may be deposited in the fiscal agency account and your liability as state treasurer for a loss incurred by failure of the fiscal agent, in event such sum lost exceeds the amount of security required of the fiscal agent.

It may be conceded at once, that the treasurer is not liable for a loss of any sum lawfully deposited in the fiscal agency account, in the absence of failure to exercise reasonable care. See Section 112-130, 1929 Code. That such is the case, to my mind, is evidenced by the fact that both Section 112-130 and Section 7, Chapter 175, Laws of 1933, the latter relating to the fiscal agent, are originally part of Chapter 76, Laws of 1933, Section 112-130 containing the following language:

"No treasurer shall be liable for the loss of public moneys by him deposited in any bank qualified to receive the same **under the provision of this act**, due to the failure of such depository, \* \* \*."

Just how much public money can be deposited with the fiscal agent in the account of the fiscal agency must be determined from Section 7, Chapter 175, Laws of 1933, after careful study.

That part of said Section 7, Chapter 175, which relates to the fiscal agent is as follows:

"Fiscal Agent of New Mexico. The State Board of Finance may designate a bank doing business in this State and having an unimpaired capital and surplus of at least \$ 150,000.00, as the fiscal agent of New Mexico. Such designation shall be subject to change from time to time by the State Board of Finance. The bank so designated shall enter into an agreement with the State of New Mexico, acting through its State Board of Finance for the collection for the State of all checks and other items received by the State on any account, the handling of the checking account of the State Treasurer, the handling of all transfers of money in connection with the sale or retirement of bonds or obligations of the State or the purchase by the State of bonds or other securities for the investment of permanent or other funds of the State, the safe-keeping of bonds or other securities belonging to or held by the State or any official thereof, the rate of interest to be paid upon average daily balances of State funds in said bank, and for acting as the agent of the State in fiscal matters generally subject always to the supervision and approval of the State Board of Finance. Such agreement shall contain such terms and conditions as in the judgment of the State Board of Finance shall be necessary for the proper conduct of the fiscal affairs of the State and the safe keeping of the moneys of

the State. Such Finance Board shall require the Fiscal Agent to furnish surety company bond or securities of the kind specified in this Act in the amount of two hundred and fifty thousand (\$ 250,000) dollars as security for the safe keeping of the moneys of the State and the faithful performance of his duties as such fiscal agent; and in case a surety company bond is so furnished, the cost thereof shall be paid by the State. The Fiscal Agent shall be required to pay the same rate of interest upon daily balances as provided in this Act to be paid by other State depositories, except that an amount on such deposits up to one hundred and fifty thousand (\$ 150,000) dollars may be received and held by such Fiscal Agent without interest, as full compensation for his services as such Fiscal Agent. Nothing herein contained shall prevent {\*71} the bank so designated as Fiscal Agent from also qualifying as a State Depository under the provisions of this Act."

It will be noted that the provisions of said Act are exactly word for word as are the provisions of Section 112-110, 1929 Code, with reference to the fiscal agent.

The duties of the fiscal agent are as follows:

- (1) Act for the state in the collection of all checks and other items received by the state on any account.
- (2) The handling of the checking account of the state treasurer.
- (3) The handling of all transfers of money in connection with the sale or retirement of bonds or obligations of the state, or the purchase by the state of bonds or other securities for the investment of permanent or other funds of the state.
- (4) The safekeeping of bonds or other securities belonging to or held by the state or any official thereof.
- (5) The rate of interest to be paid upon average daily balances of state funds in said bank.
- (6) The acting as the agent for the state in fiscal matters generally.

Said agent is, of course, subject always to the supervision and approval of the state board of finance, and must furnish a surety company bond, or other security specified by the public moneys act, in the sum of \$ 250,000, as security for the safe keeping of the public money and the faithful performance of its duties as fiscal agent. The agent must also pay the usual rate of interest upon average daily balances in its keeping, except that it may keep deposits up to \$ 150,000 upon which it pays no interest, such provision being compensation for its services as fiscal agent.

It is plainly indicated, as I view it, that the Legislature intended to provide a means of transacting the state's business daily in as convenient and safe a manner as possible. To do this, it provided that some bank, having an unimpaired capital and surplus of \$ 150,000 or more, might be selected as the fiscal agent of the state to do those things

set forth in the act with business promptness and efficiency, and the faithfulness of such agent, as well as to protect the state from loss, is guaranteed by a security in the sum of \$ 250,000. It also is apparent that such agent, in order to perform its duties, would have in its hands fluctuating sums of money, the amount of which can never be exactly estimated. Upon one occasion it might have only a small sum in its hands and yet upon another millions of dollars might have to be handled in order that such agent could perform its duties. Consequently no bond could be fixed by the Legislature which would at all times secure every dollar of public money temporarily in the agent's hands, and the Legislature, recognizing this fact, safeguarded the state to the extent of securing that amount of money which would, upon the average, be in the agent's hands to perform its duties as fiscal agent of the state.

It is my opinion therefore that public money, in any amount, may be deposited with the fiscal agent in the fiscal agency account for the purposes prescribed by statutes falling within the duties of the fiscal agent. That amount is not limited to \$ 250,000 or any other specific amount, except that no more shall be in the fiscal agency account than that amount necessary for such fiscal agent to perform the duties prescribed by law. Any other intent of the Legislature is not apparent, and, if it were, the purpose of the act would be defeated.

Holding as we do, that the amount of public funds deposited with the fiscal agent in the fiscal agency account for the purpose of enabling such agent to perform its duties is not limited nor intended to be limited by law, there can be no liability upon the part of the treasurer, in the absence of negligence, for a loss sustained by failure of the fiscal agent designated by the state board of finance and qualified as provided by law.

It is well settled by authority and on principle that, when depositories have been designated according to {<sup>72</sup>} law, neither the treasurer or his bondsmen are liable for the loss of funds deposited therein, so long as the treasurer keeps within the requirements of law.