Opinion No. 69-76

July 16, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Oliver H Miles, Assistant Attorney General

TO: Donald L. Lanford, Chairman, Lea County Board of County Commissioners, P.O. Box 1238, Lovington, New Mexico

QUESTIONS

QUESTIONS

1. Do the moneys realized through tax levy and other operating funds for the Lea County Hospital constitute public moneys within the contemplation of N.M.S.A. 11-2-4, 1953 Comp. (68 Interim Supp.)?

2. Is a "board of finance" required to equitably distribute funds among all qualifying banks within the county? If so, how is that equitable distribution to be determined?

3. What constitutes a qualifying bank within the meaning of Section 11-2-6, N.M.S.A., 1953 Comp.?

4. Is the "board of finance" as defined in Section 11-2-6, N.M.S.A., 1953 Comp. composed of members of the board of trustees of the county hospital or of members of the board of county commissioners?

5. Is there a conflict of interest when one or more of the board of finance are also employees of or have a direct financial interest in a qualifying bank within the county?

6. Who would be qualified to be an ex-officio member of the board of trustees of a county hospital? Can an ex-officio member of the board of trustees of a county hospital make or second a motion in the meetings of the board?

CONCLUSIONS

1. Yes.

2. Yes, but see analysis.

3. See analysis.

4. The board of finance is composed of members of the board of trustees of the county hospital.

5. See analysis.

6. See analysis.

OPINION

*{*117}* ANALYSIS

We have taken the liberty of rephrasing some of your questions in order to better present the exact legal issues involved.

There can be no question but that the moneys derived from tax levies and used to support a county hospital are public funds. See Opinion of the Attorney General No. 67-128, issued October 31, 1967. Therefore, they must be deposited according to the guidelines contained in New Mexico Statutes regarding the equitable distribution of public funds to qualifying banks within the county. Section 11-2-35, N.M.S.A., 1953 Comp. provides:

"When two [2] or more banks shall qualify under the provisions of this act . . . as depositories of the public moneys of any county, city or town, or board in control in the state, 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; except as provided in section 11 hereof."

We see from the compiler's note following the above section that Section 11 was repealed by Laws 1933, Ch. 175, § 13, and may be deemed to have been replaced by Section 11-2-33, N.M.S.A. (1968 Interim Supp.). Therefore, we must look to the latter section to determine whether an applicable exception exists. This section, in pertinent part, provides:

The treasurer of every county, municipality or board of control, . . . shall deposit public moneys in one [1] or more banks, or savings and loan associations whose deposits are insured by an agency of the United States, within his county, which have qualified as depositories thereof or which have been excused from qualifying as depositories thereof by reason of the insurance of their account by an agency of the United States under the provisions of this act . . . The treasurer of every county and municipality may deposit money in one [1] or more accounts with any such savings and loan association or associations located in his respective county, but no county or municipal treasurer, in any official capacity, shall deposit money in any one [1] such association the aggregate of which would exceed the amount of insurance for a single depositor in an individual capacity. Public moneys so deposited with banks which have *{*118}* qualified as depositories 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, but when no bank in the county shall have so qualified, or when he shall have in his custody public moneys in excess of the aggregate amount of which banks in his county shall

have qualified, such moneys or such excess, as the case may be, shall be deposited in a duly qualified depository or depositories in some other county in this state. In an emergency when properly qualified depositories for public moneys of any county, municipality or board in control cannot be procured, the state board of finance may, on proper showing of such emergency and inability to secure proper depositories for such moneys authorize and direct the deposit of any such public moneys in the state fiscal agency account. County treasurers with the consent and advice of their respective boards of finance may designate not to exceed two [2] banks within their respective counties, and which have duly qualified as county depositories under the provisions of this act, as checking depositories and may deposit therein addition to their prorata share, not to exceed fifteen per cent [15%] of the total county funds, as checking accounts."

It would therefore appear that all public funds, except for the 15% exemption, must be equitably distributed among all of the qualifying banks within the county. For the method of computing this equitable distribution see Opinion of the Attorney General No. 63-20, copy enclosed.

The next question to be determined is what constitutes a "qualifying bank" within the meaning of the above cited statutes. We find no clear definition in the statutes. However, it would appear that any bank within the county which applies for its prorata share of county funds, has the required insurance, pledges the necessary collateral, and generally meets the statutory standards set for banks which may be depositories for public moneys must be designated as a qualifying bank, see **State ex rel. Bank v. Romero,** 24 N.M. 649, 175 P. 771 (1918).

You next ask us whether the board of county commissioners or the trustees of the county hospital have the authority to sit as a board of finance for purposes of receiving, handling, and accounting for the funds entrusted to the county hospital. Section 11-2-6, N.M.S.A., 1953 Comp. provides:

"The boards in control of the various public and educational institutions in this state, and all other boards handling funds in any manner whatever, except local boards of education, are hereby designated as boards of finance for such institutions and boards respectively. Each of such boards shall receive, handle and account, as provided by law, for all public moneys received by it, and shall deposit the funds of such institutions or boards in a depository or depositories qualified in accordance with the requirements of this act . . . equitably and upon the terms and conditions and in the manner and subject to such limitations as in this act prescribed for the deposit of public moneys by other boards of finance."

In answer to your question, it would appear that the board of trustees of the county hospital would have the authority to sit as a board of finance. They would, however, be regulated by the same standards as would the members of any other board of finance within the state or its political subdivisions.

As we view the matter, this board of finance has little or no *{*119}* discretion in selecting banks within the county which are to receive public funds, except for the checking account exemption mentioned earlier in this opinion. Therefore, we fail to see a conflict of interest because some of the members of the board of trustees of the hospital have a direct financial interest in, or are employed by, one or more of the banks within the county. See Advisory Opinion of the Attorney General to the District Attorney of Lee County dated September 22, 1961, a copy enclosed.

You also ask who is qualified to be an ex-officio member of the board of trustees of the county hospital and whether this ex-officio member may make or second a motion in the board's meetings. Section 15-48-10, N.M.S.A., 1953 Comp., provides for a five-member board and makes no provision for ex-officio members, we would therefore assume that the legislature intended that the five-member board be the only person who could conduct business of the board. An ex-officio member of a board is one who is automotically vested with membership by virtue of his holding another office, see Opinion of the Attorney General No. 5408, dated August 29, 1951, copy enclosed. We find no provision in the statutes for anyone to act as an ex-officio member of a county hospital board and we therefore are led to the conclusion that, since it is not specified, no such office exists.