



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

March 16, 1954

Hon. J. W. Edgar
Commissioner of Education
Texas Education Agency
Austin, Texas

Letter Opinion No. MS-122

Re: Selection of depository for local
maintenance funds of an independ-
ent school district.

Dear Dr. Edgar:

You have requested an opinion from this office regarding the selection of a depository for local maintenance funds of an independent school district. Your questions arise from the provisions of Article 2832, V.C.S., which reads, in part, as follows:

"In any independent district of more than one hundred fifty (150) scholastics, . . . the treasurer of the school fund shall be that person or corporation who offers satisfactory bond and the best bid of interest on the average daily balances for the privilege of acting as such treasurer. . . .

". . . Said bond shall be payable to the president of the board and his successors in office, conditioned for the faithful discharge of the treasurer's duties and the payment of the funds received by him upon the draft of the president of the school board drawn upon order, duly entered, of the board of trustees. Said bond shall be further conditioned that the treasurer shall safely keep and faithfully disburse all funds coming into his hands as treasurer, and shall faithfully pay over to his successor all balances remaining in his hands. It shall be approved by the school board and the State Department of Education shall be notified of the treasurer by the president of the school board filing a copy of said bond in said department. . . . "*

Your first question reads as follows:

"Does an independent school district, having its own depository, have the implied power to place whatever local maintenance funds it may determine may not presently be needed for the operation of its

*Emphasis throughout this opinion has been added.

current school program, in a time deposit account with its depository for the purpose of earning interest on such monies which otherwise being in demand account would earn no interest? If the answer to this question is in the affirmative, then may the school district board legally take into consideration, in awarding a depository contract, the amount of interest offered on time deposits by bidders on the depository contract?"

The words "treasurer" and "depository" are synonymous when used in this opinion. Article 2828, Vernon's Civil Statutes.

In the case of Royse Independent School District v. Reinhardt, 159 S.W. 1010 (Tex.Civ.App. 1913), the court held that a board of trustees of an independent school district "is a creature of statute" and "has only such powers as are conferred upon it and such implied powers as are necessary to execute such express powers." The holding in that case was also cited with approval by the court in the case of Thompson v. Elmo Independent School District, 269 S.W. 868 (Tex. Civ.App. 1925), wherein the court held:

"Such powers as the board of trustees of independent school districts have over the school funds belonging to such districts, and the manner in which such powers shall be exercised, are prescribed by law, and the manner of exercise so prescribed must be followed to the exclusion of all other methods."

It is thus clear that in selecting the treasurer of the school funds of an independent school district, the board of trustees must exercise its power to make such selection in conformity with the express statutory provisions of Article 2832 which provides the basis or criteria to be used in making such selection.

Prior to the passage of the Federal Reserve Act in 1935, state and county funds in depositories were required to draw interest. The provisions of the Federal Reserve Act made it unlawful for a national bank to pay interest on demand deposits. Subsequently, the Texas Legislature, under the provisions of Senate Bill 240, Acts 45th Legislature, Regular Session, 1937, chapter 164, page 319, amended Article 2525, V.C.S., so as to authorize the State Depository Board to determine and designate a portion of the state funds deposited in State Depositories as "demand deposits" and a portion of such funds as "time deposits".

The payment of interest on county funds by national banks was also affected by the Federal Reserve Act. The same Legislature which, in 1937, amended the statutes governing deposits of state funds

Hon. J. W. Edgar, page 3 (MS-122)

also passed House Bill 572, Acts 45th Legislature, Regular Session, 1937, chapter 484, page 1298, which amended Article 2546, V.C.S., so as to authorize the County Commissioners' Court to determine and designate a portion of county funds which may be deposited as "demand deposits" and also to determine and designate a portion of such funds as "time deposits."

Article 2832, V.C.S., contains the current pertinent statutory provisions governing the selection of depositories for funds belonging to independent school districts of more than 150 scholastics. It provides, in part, that:

" . . . the treasurer of the school fund shall be that person or corporation who offers satisfactory bond and the best bid of interest on the average daily balances for the privilege of acting as such treasurer."

In the case of Jones v. Marrs, 114 Tex. 62, 263 S.W. 570 (1924), the Court construed the meaning of the words "average daily balances" used in Article 2832, V.C.S., as follows:

" . . . The various balances for the different days in the period for which the interest is to be paid are the daily balances for the interest period. The sum of those daily balances divided by the number of days in the interest period is the average daily balance for the interest period."

Our opinion is that the words "average daily balances" have a well defined and understood meaning as applied to bank deposits. The words are used in banking circles to apply to a deposit account which has, or may have, a changing balance from day to day. A "time deposit" does not have an "average daily balance" as that term is used and understood with respect to bank deposits. A "time deposit" has a balance during the entire period agreed upon by the depositor and the bank which is fixed, static, and does not and can not change from day to day. It is clear, therefore, that in order for a deposit account to have an "average daily balance" it must be a "demand deposit". Further, the provisions of Article 2832 require that the bond furnished by the depository be conditioned upon "the payment of the funds received by him upon the draft of the president of the school board. . ." The funds on deposit are therefore required to be subject to withdrawal upon the draft of the president of the school board. Thus, again, the provisions of Article 2832 clearly show that the school funds of such independent school districts must be placed in "demand deposit" accounts.

The language of the pertinent portions of Article 2832 is substantially the same as that which was previously a part of the statutes governing deposits of state and county funds prior to the amendments which authorized "time deposits." The provisions of Article

2832 have not been changed since 1933. It is to be presumed that the 45th Legislature which, in 1937, amended the statutes governing the selection of depositories for state and county funds so as to authorize the designation of a portion of state and county funds as "time deposits", knew the provisions of Article 2832. It is to be presumed that every Legislature which has met during the almost 20 years since the passage of the Federal Reserve Act had knowledge of the provisions of Article 2832, yet there has been a failure or refusal to make the necessary changes so as to authorize independent school districts to place a portion of school funds in "time deposits". While we will not attempt to rationalize in an effort to justify this situation, we can see a reason why there may have been a refusal rather than a failure to so amend Article 2832. In the case of "time deposits" the control over the funds would pass out of the hands of the school board and would not be available during the term of the time deposit contract. It may well be that the various Legislatures which have met during the past several years have felt that it would be more advantageous to have all funds readily available at all times under the "demand deposit" type of account.

Our opinion is that the provisions of Article 2832 indicate the clear intention of the Legislature that the entire local maintenance funds of an independent school district, which are subject to the provisions of that Article, must be placed with the treasurer of such district as "demand deposits".

Your second question reads as follows:

"May the board of school trustees of an independent district, acting under Article 2832 in making its selection of a depository on a bid basis, legally evaluate and consider bank service offers and offers concerning interest rates that will be charged the district for emergency short term loans, commonly referred to as overdraft loans?"

The school board cannot consider any illegal offers submitted in a bid. Section 19 of the Federal Reserve Act provides:

"No member bank shall, directly or indirectly by any device whatsoever, pay any interest on any deposit which is payable on demand."

In a letter dated July 21, 1953, from Mr. L. G. Pondrom, Vice President of the Federal Reserve Bank of Dallas, Texas, to Mr. Roy H. Schultz, Vice President of the El Paso National Bank, El Paso, Texas, Mr. Pondrom expressed his opinion concerning whether certain offers contained in a bid of that bank to act as depository of the Independent School District of the City of El Paso would violate Section 19 of the Federal Reserve Act (supra) and Regulation Q of the Board of

Governors of the Federal Reserve System. The bid of the bank contained an offer as follows:

"We agree to carry your overdrafts represented by legally issued current warrants on notes, if and when needed, pending collection of current income, at 1.9% interest per annum payable monthly."

Section 2(a) of Regulation Q reads as follows:

"Interest prohibited. Except as hereinafter provided, no member bank of the Federal Reserve System shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit. Within this regulation, any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit shall be considered interest."

Mr. Pondrom stated, in effect, that the offer of the bank to carry "overdrafts" (which are actually short term loans) at a rate of 1.9% interest per annum appeared to be a lower rate of interest than the bank usually and customarily charges and much lower than the bank would charge the school district if it failed to place its deposits with them. Mr. Pondrom stated that if such be the true and actual facts, and "if the amounts involved in each instance were not so small as to be considered trivial and therefore legally disregarded", and if such rate was not afforded to customers generally, then such offer, if consummated, would constitute the payment of interest in violation of Regulation Q.

The bid of the bank also contained the following offer:

"We will furnish without charge our safety paper for your use in printing the checks to be used against your accounts under this depository agreement."

Mr. Pondrom stated:

"The word 'pay' ordinarily means the use of money; however, it is of comprehensive meaning and does not necessarily refer to money. It may imply the transfer, giving and delivery of money, property, or services and may include the doing of an act of the exercise of a forbearance. . . . In this connection the Board of Governors has ruled that the absorption of exchange charges by a bank constitutes a 'payment' within the meaning of the term as used in Regulation Q, 1943 Federal Reserve Bulletin 817, thus indicating to us that the term is to be construed broadly. We see no material distinction between the absorption of exchange charges and the waiving of pecuniary rights or absorption of expenses such as are offered in your bid."

It follows from our answer to your first question that since a bank which is a member of the Federal Reserve System cannot offer in its bid to act as treasurer of the school funds, to pay interest on such funds because they must be demand deposits, the school board cannot consider offers in a bid from such banks which would indirectly constitute such illegal payment of interest. We are unable to see how a bank which is a member of the Federal Reserve System can make a "bid of interest on the average daily balances," either directly or indirectly, on a demand type deposit of school funds without violating the provisions of Section 19 of the Federal Reserve Act and Regulation Q of the Board of Governors of the Federal Reserve System. Further, we agree with the opinion expressed by Mr. Pondrom in regard to whether the particular offers in the bid of the El Paso National Bank would constitute an offer to pay interest on demand deposits in violation of federal laws and regulations. Each particular offer in a bid must rest on its own merits, but it appears clearly that in each case in which the offer concerns services offered by the bank the rule to be applied is the same: Are the services offered afforded to customers generally?

In the case of Donna Independent School District v. First State Bank, 227 S.W. 974 (Tex.Civ.App. 1921), the Court construed the meaning of the words "the best bid of interest" as used in Article 2771, V.C.S., Supp. 1918, the provisions of which statute, as amended in 1933, are now known as Article 2832, V.C.S. In that case the Court held:

"It is clear from the law that the discretion is vested in the board of trustees of the selection of the depository. No one else is vested with that discretion, and when that discretion has been exercised and a depository appointed no one can question the authority of the board without clearly proving an abuse of the discretion. It will be noted that the law does not state that the person or corporation named as treasurer or depository of the school district fund shall be that one who offers a satisfactory bond and the 'highest bid of interest,' for that would deprive the board of the exercise of discretion, but the law says 'the best bid of interest,' and the right to judge of what is the best bid is lodged in the hands of the board of trustees. The best bid would not necessarily be the highest bid, but, looking to the solvency of the bidder, the bond tendered, and all the circumstances surrounding the transaction, the safety and preservation of the school fund, the best bid might be the lowest bid, as it was deemed to be by the board of trustees in this instance. . . ."

We think that in order to fully understand the meaning and intended application of the emphasized portions of the holding of the Donna case (which we have underscored), the facts found by the Court must be equally emphasized. We quote these facts from that case:

"The facts indicate that the board of trustees requested bids from the two banks as to what each would pay for the use of the school money, and appellee bank bid 8 1/4 per cent. on deposits and appellant bank 5 per cent. The board of trustees selected the latter as the depository. The First State Bank had been the depository prior to the last selection when the board of trustees selected appellant bank. There was evidence tending to show that the appellee bank had failed and refused to make a report to the board of trustees and they could not obtain any information as to their financial standing. That bank did not tender any bond. The comptroller of public accounts required a bond of \$88,000. The bank never paid any interest, so far as the board of trustees could ascertain, on the deposits, and the board deemed it best for the district to change the depository. Warrants issued by the board were denied payment by appellee bank, while it was treasurer, without giving any reason for such action to the board."

When the holding in the Donna case is applied to the facts found by the Court, the soundness of the decision in that case is readily apparent. However, in that case both banks had submitted bids of interest on the average daily balances, and the court merely held, in effect, that the best bid of interest on the average daily balances was not necessarily the highest bid of interest on the average daily balances, and that this was certainly true with regard to the facts in the case then before the court.

We think that the language of the holding in the Donna case should not be so construed as to mean that a school board can consider any and all matters which, in a broad sense, might ordinarily be considered by other persons who are not bound by statutory provisions relating to matters of a similar nature.

The court, in the Donna case, did not say that the board of trustees could consider offers of a bidder to perform, at no cost, services incidental to the handling of funds deposited with them. The court did not say that the board could consider offers of the bidder to charge reduced rates of interest on short term loans (commonly referred to as overdrafts) to the school district. Such offers are not "bids of interest on the average daily balances". They are matters of a wholly different nature. Neither Article 2832 nor the holding in the Donna case should be given a warped construction which would in effect change or add to the plain language of Article 2832 which clearly sets out the offers which a school board may consider.

We think that the court did not intend to, and actually did not, enlarge by construction the statutory authority of the school board

as to offers it could consider in selecting the treasurer of the school funds of the district. In reference to that part of the holding wherein the court held that the board could consider "all the circumstances surrounding the transaction" it must be borne in mind that the "circumstances" to which the court had reference were the known facts concerning the manner in which one of the bidding banks had conducted itself with reference to performing its obligations as depository of such funds, and the "transaction" which the court had reference to was the bids of interest on the average daily balances.

Nowhere in the Donna case, or in any other reported Texas case, have we been able to find a court decision which, by construction of Article 2832, would give a school board authority to consider any offers in a bid other than an offer of satisfactory bond and an offer to pay interest on the average daily balances of the school funds of the school district. Our opinion is that such authority does not exist.

Therefore, your second question is answered in the negative.

Although the best business advantage may not be obtained under this construction, we are constrained to state to you our conception of the true legislative intent. If the basis for the selection of a treasurer is not adequate or is no longer suitable, appropriate changes, additions, or deletions are matters solely within the realm of legislative action.

Your third question reads as follows:

"In the light of facts submitted, is the depository contract award made on July 10, 1953, by the El Paso District School Board to the State National Bank of El Paso valid, void, or voidable?"

In view of our answers to your first and second questions we think it is apparent that the Board of Trustees of the El Paso Independent School District, in calling for bids on matters not authorized to be considered under the provisions of Article 2832, V.C.S., and in considering offers of bidders which the Board was not authorized to consider in making the selection of the treasurer of the school funds of the district, unintentionally exceeded their statutory power.

Our opinion is that the depository contract award made on July 10, 1953, by the El Paso Independent School District Board of Trustees to the State National Bank of El Paso is voidable and that

Hon. J. W. Edgar, page 9 (MS-122)

the Board of Trustees should call for new bids which will contain only those offers which the Board is authorized to consider.

Yours very truly,

JOHN BEN SHEPPERD
Attorney General of Texas


By *James N. Castleberry, Jr.*
James N. Castleberry, Jr.
Assistant

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