

October 28, 2014

The Honorable David Kelley
Adams County Prosecuting Attorney
110 West Main Street
Courthouse
West Union, Ohio 45693

SYLLABUS:

2014-039

1. R.C. 135.35(A)(4) authorizes a county investing authority to invest inactive moneys of the county in a bond issued by the board of county commissioners of the investing authority's county.
2. A county treasurer who serves as the county investing authority may invest inactive moneys of the county in a bond issued by the board of county commissioners of the treasurer's county even though the county investment advisory committee has to amend its investment policies to permit the investment and the county investment advisory committee is composed of two county commissioners and the county treasurer.



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OPINION NO. 2014-039

The Honorable David Kelley
Adams County Prosecuting Attorney
110 West Main Street
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West Union, Ohio 45693

Dear Prosecutor Kelley:

You have requested an opinion whether R.C. 135.35(A)(4) authorizes a county treasurer to expend inactive moneys of the county to purchase a bond that is issued by the board of county commissioners of the treasurer's county. You also ask whether the county treasurer and the board of county commissioners have a conflict of interest that prohibits the bond purchase when the county investment advisory committee, which is composed of two county commissioners and the county treasurer, has to amend its investment policy to permit the investment and the board of county commissioners has to sign the investment policy.¹

Investing Inactive Moneys of the County Pursuant to R.C. 135.35(A)(4)

R.C. 135.341(A) creates a county investment advisory committee in each county. The county treasurer and two county commissioners are the members of the county investment advisory committee.² *Id.* “The [county investment advisory] committee shall establish written county investment policies[.]” R.C. 135.341(C). R.C. 135.341(C) further requires the county investment advisory committee to “meet at least once every three months, to review or revise its policies and to advise the investing authority on the county investments in order to ensure the best and safest return of funds available to the county for deposit or investment.”

¹ This opinion does not address whether an investing authority of a county that has adopted an alternative form of government pursuant to Ohio Const. art. X, § 1 or a charter pursuant to Ohio Const. art. X, §§ 3 and 4 may invest the county's inactive moneys in a bond issued by the investing authority's county.

² A board of county commissioners is authorized to designate three county commissioners as members of the county investment advisory committee, in which case “the county investment advisory committee shall consist of five members: the three county commissioners, the county treasurer, and the clerk of the court of common pleas of the county.” R.C. 135.341(A).

A county treasurer is the county's investing authority, unless the board of county commissioners makes an alternative designation under R.C. 135.34.³ R.C. 135.31(C), (F). R.C. 135.35(A) requires an investing authority to "deposit or invest any part or all of the county's inactive moneys" in various securities and obligations.⁴ R.C. 135.35(A) identifies the securities and obligations in which inactive moneys may be deposited or invested. The focus of your inquiry is R.C. 135.35(A)(4), which authorizes an investing authority to invest inactive moneys of the county in "[b]onds and other obligations of this state or the political subdivisions of this state[.]"

To discern the meaning of a statute, we begin with its plain language. *State v. Coburn*, 121 Ohio St. 3d 310, 2009-Ohio-834, 903 N.E.2d 1204, at ¶8. The plain language of the statute controls when the statute's meaning is not ambiguous. *Id.* (the court must "apply the statute as written when its meaning is clear and unambiguous"); *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 721 N.E.2d 1057 (2000) ("[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation"). A statute is ambiguous when it is reasonably capable of having multiple meanings. *In re Adoption of Baby Boy Brooks*, 136 Ohio App. 3d 824, 829, 737 N.E.2d 1062 (Franklin County 2000). "[I]nquiry into the legislative intent, legislative history, public policy, the consequences of an interpretation, or any of the other factors listed in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of more than one meaning." *Id.*

³ If, after reviewing the investing procedures of the investing authority, the board of county commissioners determines that the investing authority has unlawfully invested the county's inactive moneys or has invested the inactive moneys contrary to the county's investment policies, and has failed to correct the unlawful or erroneous procedures, the board of county commissioners "may designate, by resolution, the board as a whole, one of its members, or one of its employees as the investing authority[.]" R.C. 135.34.

⁴ "[A]ll public moneys in public depositories in excess of the amount determined to be needed as active moneys" constitute "inactive moneys" for purposes of R.C. 135.31-.40. R.C. 135.31(B). R.C. 135.31(A) provides:

"Active moneys" means an amount of public moneys in public depositories determined to be necessary to meet current demands upon a county treasury, and deposited in any of the following:

- (1) A commercial account and withdrawable, in whole or in part, on demand;
- (2) A negotiable order of withdrawal account as authorized in the "Consumer Checking Account Equity Act of 1980," 94 Stat. 146, 12 U.S.C.A. 1832(a);
- (3) A money market deposit account as authorized in the "Garn-St. Germain Depository Institutions Act of 1982," 96 Stat. 1501, 12 U.S.C. 3503.

In accordance with the foregoing authorities, we begin by examining the plain language of R.C. 135.35(A), which states, in pertinent part, that “[t]he following classifications of securities and obligations are eligible for ... deposit or investment [of inactive moneys]: ... (4) Bonds and other obligations of this state or *the political subdivisions of this state*[.]” (Emphasis added.) The emphasized portion of the statute allows an investing authority to invest in bonds issued by political subdivisions of Ohio. Therefore, to determine whether a bond issued by the board of county commissioners of the investing authority’s county constitutes a bond of a political subdivision of the state for the purpose of R.C. 135.35(A)(4), we must understand the meaning of “political subdivisions of this state.”

A statute’s terms shall be given their common and ordinary meanings, unless the terms “have acquired a technical or particular meaning, whether by legislative definition or otherwise[.]” R.C. 1.42. There is no statutory definition of “political subdivisions” for purposes of R.C. 135.35(A)(4).⁵ “Political subdivisions,” as that term is used in R.C. 135.35(A)(4), also has not acquired a technical meaning in Ohio case law. Consequently, we look to the ordinary meaning of “political subdivision,” which is “a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function.” 2002 Op. Att’y Gen. No. 2002-038, at 2-244 (quoting 1972 Op. Att’y Gen. No. 72-035, at 2-135). A county comes within the scope of this definition and is generally considered a political subdivision. *See, e.g., Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, 927 N.E.2d 585, at ¶18 (“a county is a political subdivision” for purposes of R.C. Chapter 2744); 1996 Op. Att’y Gen. No. 96-018, at 2-69 (“each county is established as a political subdivision of the state” for the purpose of determining whether a township trustee holds a township or county office). Thus, for the purpose of R.C. 135.35(A)(4), “the political subdivisions of this state” includes the counties of the state.

Having concluded that “the political subdivisions of this state” in R.C. 135.35(A)(4) includes the counties of the state, we must now determine whether that phrase includes a county investing authority’s county. R.C. 135.35(A)(4) does not impose any qualifications or restrictions as to which political subdivisions may be the issuer of the bonds or obligations. Nothing in the plain language of R.C. 135.35(A)(4) indicates that the bonds or other obligations of only certain political subdivisions

⁵ While R.C. Chapter 135 does not provide a definition of “political subdivisions” for purposes of R.C. 135.35(A)(4), “political subdivision” is defined for purposes of R.C. 135.143 as “a county, township, municipal corporation, or school district.” R.C. 135.143(J). Within R.C. Chapter 135, different definitions of “subdivision” have been enacted for different purposes. For purposes of R.C. 135.01-.21 (deposit and investment of public moneys of the state and subdivisions other than counties) and R.C. 135.22 (requirement of continuing education for treasurers other than the Treasurer of State and county treasurers), a county is excluded from the definition of “subdivision.” R.C. 135.01(L); R.C. 135.22(A)(2). However, a “subdivision” includes a county for purposes of R.C. 135.181 (public depository pledging requirements), R.C. 135.45 (payment of moneys into the Ohio Subdivision’s Fund), and R.C. 135.46 (payment of bond proceeds into the Treasurer of State’s taxable investment pool or tax-exempt investment pool). R.C. 135.181(A)(3); R.C. 135.45(F)(2)(a); R.C. 135.46(H)(5).

are eligible for investment by a county investing authority. To find that the phrase “the political subdivisions of this state” refers exclusively to counties other than the investing authority’s county, words must be added to or removed from R.C. 135.35(A)(4). For example, “the” must be replaced by “other,” “another,” or “a different.” A reading of a statute that is premised upon the addition or removal of words is not an acceptable practice. *See State ex rel. Fenley v. Ohio Historical Soc’y*, 64 Ohio St. 3d 509, 511, 597 N.E.2d 120 (1992) (court declines to adopt an interpretation of the statute that would require the court to add words that are not in the statutory text).

On its face, R.C. 135.35(A)(4)’s meaning is clear. The language of R.C. 135.35(A)(4) is not ambiguous as it cannot reasonably be interpreted to have more than one meaning. The phrase “the political subdivisions of this state” in R.C. 135.35(A)(4) means all of the political subdivisions of the state. In this instance, all political subdivisions of the state means, *inter alia*, all counties of the state, including a county investing authority’s county. *See* 1982 Op. Att’y Gen. No. 82-034, at 2-103 (under R.C. 135.35(A)(4), “[a] county may ... invest in its own warrants if such warrants constitute a bond or other obligation”). We conclude that R.C. 135.35(A)(4) authorizes a county investing authority to invest inactive moneys of the county in a bond issued by the board of county commissioners of the county investing authority’s county.⁶

Our conclusion is further supported by R.C. 135.35(C), which requires an investment of a county’s inactive moneys to “mature within five years from the date of settlement[.]” However, the five-year maturity date limitation does not apply to an investment that “is matched to a specific obligation or debt of *the county* or to a specific obligation or debt of a political subdivision of this state[.]” R.C. 135.35(C) (emphasis added). This language indicates that R.C. 135.35 authorizes a county’s inactive moneys to be invested in obligations of a county investing authority’s county.

In reaching this conclusion we are mindful of a county investment advisory committee’s duty to establish, review, and revise the county’s investment policies and “to advise the investing authority on the county investments in order to ensure the best and safest return of funds available to the county for deposit or investment.” R.C. 135.341(C). Other than authorizing a county investment advisory committee to consult with an investment advisor, R.C. 135.341(D), R.C. 135.341 does not establish specific means by which a county investment advisory committee ensures the safest and best return of invested moneys. Accordingly, in carrying out its duties under R.C. 135.341(C), a county investment advisory committee must exercise reasonable discretion. *See State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) (“[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty”); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 11-12, 112 N.E. 138 (1915) (if an officer is required to perform an act by the Constitution, but the means of performing the act are not specified, “it necessarily follows that the officer who is required to perform this duty has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing

⁶ Our conclusion assumes that the investment of inactive moneys is made in a bond that has been lawfully issued by a board of county commissioners in accordance with applicable constitutional and statutory requirements.

the thing commanded”); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (“[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner”); 2012 Op. Att’y Gen. No. 2012-018, at 2-154; 1986 Op. Att’y Gen. No. 86-099, at 2-554 (“in the absence of specific direction regarding the manner and method of performance of a duty, public officers have the implied authority to exercise reasonable discretion in performing their statutory duties”).

Additionally, decisions that a county investing authority and a county investment advisory committee make regarding the investment of county moneys shall comport with and be guided by the fiduciary standards applicable to persons or entities that serve as trustees of public moneys:

In general, a public officer, as a fiduciary with respect to public funds under such officer’s control, is required to exercise the same degree of care, skill, and judgment with respect to investment decisions as are consistent with the fiduciary responsibility to preserve and safeguard the financial integrity and soundness of such funds.

1993 Op. Att’y Gen. No. 93-054, at 2-258.; *accord* 1994 Op. Att’y Gen. No. 94-048, at 2-241; *see generally* 1989 Op. Att’y Gen. No. 89-033, at 2-151 to 2-153 (discussing the fiduciary responsibility of the Industrial Commission when investing state insurance fund moneys). Accordingly, a county’s investment policies may authorize the investment of a county’s inactive moneys in a bond issued by the county investing authority’s county when, in the reasonable exercise of its discretion, a county investment advisory committee determines that the investment comports with the fiduciary standards that govern the investment and will ensure the safest and best return on the moneys so invested.

Conflict of Interest

We now turn to the second part of your inquiry, which asks whether a county treasurer and a board of county commissioners have a conflict of interest that prohibits investment of the county’s inactive moneys in a bond issued by the board of county commissioners of the treasurer’s county. You question whether a conflict of interest exists in a situation where the members of the county investment advisory committee are the county treasurer and two county commissioners, the county investment advisory committee has to amend its investment policies to permit the investment in a bond issued by the board of county commissioners, and the board of county commissioners has to sign the investment policies.⁷ For the reasons that follow, we believe a county treasurer’s investment

⁷ Unless inactive moneys are invested in a no-load money market mutual fund (under R.C. 135.35(A)(5)), in the Ohio subdivision’s fund (under R.C. 135.35(A)(6)), in an unpaid or delinquent tax line of credit (under R.C. 135.35(A)(11)), or in a bond or other obligation of a county land reutilization corporation (under R.C. 135.35(A)(11)), investments of a county’s inactive moneys

shall be made only through a member of the financial industry regulatory authority (FINRA), through a bank, savings bank, or savings and loan association regulated by the superintendent of financial institutions, or through an institution regulated by the

of a county's inactive moneys in a bond issued by the treasurer's county, under the circumstances you have described, is not prohibited by a conflict of interest.

Generally, a conflict of interest exists "when a person ... is subject to divided loyalties, conflicting duties, or to the temptation to act other than in the public's best interest." 2012 Op. Att'y Gen. No. 2012-040, at 2-350; *see also* 2013 Op. Att'y Gen. No. 2013-002, at 2-18. Your concern about a conflict of interest appears to originate from the fact that, in order to invest the county's inactive moneys in a bond issued by his county, the county treasurer, as the county investing authority, and the board of county commissioners are effectively on both sides of the transaction. The county treasurer, as a member of the county investment advisory committee, participates in the formulation and adoption of the amendment to the county's investment policies that will permit him to purchase the bond. *See* R.C. 135.341(A), (C). The county treasurer, as the county investing authority, subsequently effects investment of county inactive moneys in the bond. *See* R.C. 135.35(A). Similarly, the county commissioners who serve on the county investment advisory committee participate in the formulation and adoption of the amendment to the county's investment policies that will permit the investment of the county's inactive moneys in a bond issued by their county. *See* R.C. 135.341(A), (C). As members of the board of county commissioners, those commissioners serve as the bond's issuing authority. *See, e.g.*, R.C. 133.01(T), (FF); R.C. 165.01(E).

As explained above, R.C. 135.35(A)(4) authorizes a county investing authority to invest the county's inactive moneys in bonds or other obligations of the county investing authority's county. R.C. 135.35(C) explicitly recognizes that a county investing authority may invest a county's inactive moneys in a debt or obligation of the investing authority's county and that the county investment advisory committee may permit such an investment.⁸ The members of the investment advisory

comptroller of the currency, federal deposit insurance corporation, or board of governors of the federal reserve system.

R.C. 135.35(J)(1). The written investment policy that an investing authority approves and files with the Auditor of State "shall require that all entities conducting investment business with the investing authority shall sign the investment policy of that investing authority." R.C. 135.35(K)(1). The entities identified in R.C. 135.35(J)(1) that advise an investing authority or that execute an investing authority's transactions must sign the investment policy. R.C. 135.35(K)(1).

Insofar as a bond issued by a county under R.C. 135.35(A)(4) is not a security that is excepted from the requirement of R.C. 135.35(J)(1), the investment of a county's inactive moneys in a bond issued by the county must be made through an R.C. 135.35(J)(1) entity. Thus, the R.C. 135.35(J)(1) entity through which the investment is made is required to sign the investment policy pursuant to R.C. 135.35(K)(1).

⁸ Subject to an exception in R.C. 135.35(D), R.C. 135.35(C) declares that "any investment made pursuant to [R.C. 135.35] must mature within five years from the date of settlement, unless the investment is matched to a specific obligation or debt of the county or to a specific obligation or debt

committee are determined by statute. R.C. 135.341(A). In addition, establishing, reviewing, and revising the county's investment policies, as well as providing advice to the county investing authority regarding county investments are statutory duties of a county investment advisory committee. R.C. 135.341(C); *see* 1992 Op. Att'y Gen. No. 92-025, at 2-88 (“[t]he county investment advisory committee, accordingly, may restrict the types of instruments in which the county investing authority may invest or deposit the county's inactive moneys”). The investing authority is required to adhere to the investment policies established by the county investment advisory committee. *See* R.C. 135.34 (a board of county commissioners may designate another person or themselves as the investing authority if a county treasurer who serves as the investing authority fails to comply with a county investment advisory committee's investment policies).

Our consideration of R.C. 135.34, R.C. 135.341, and R.C. 135.35 leads us to conclude that the General Assembly intends that a board of county commissioners and a county treasurer cooperate and interact with each other in fulfilling the financial duties and responsibilities assigned to them by the General Assembly. The cooperation and interaction envisioned by this statutory plan necessarily means that the same public officers will determine which investments will be permitted by a county's investment policies, approve and adopt those investment policies, and execute the investments authorized by those policies. The pertinent statutory framework anticipates and requires cooperation between a board of county commissioners and a county treasurer in establishing investment policies and, thereafter, in investing the county's moneys. Cooperation between these elected officers and their performance of statutory responsibilities in more than one capacity is specifically authorized by the General Assembly.

Where the General Assembly has sanctioned overlapping roles for a public officer or employee, despite the potential for conflicts of interest, we have advised that the potential conflicts of interest do not prohibit the actors from performing their statutory duties. *See, e.g.,* 2012 Op. Att'y Gen. No. 2012-040, at 2-351 (“[b]ecause the General Assembly has authorized a person to serve simultaneously as a township trustee and member of the governing board of a county land reutilization corporation even though conflicts of interest may exist between the two positions, we do not find it necessary to consider whether any conflicts do in fact exist.... Accordingly, the positions ... are not rendered incompatible because of the possibility of conflicts of interest”); 1989 Op. Att'y Gen. No. 89-063, at 2-285 (“[i]t is reasonable, therefore, to assume, in light of the purposes of R.C. Chapter 167 and absent manifest intent to the contrary, that the General Assembly did not intend that the conflict of interest provisions of R.C. 340.02 would prevent community mental health board members or employees from representing the board on a regional council of governments”); 1984 Op. Att'y Gen. No. 84-018, at 2-62 (“the General Assembly by enacting R.C. 505.011 [which permits appointment of a township trustee as a volunteer firefighter for the township] has implicitly sanctioned this use of appointive powers. The General Assembly has evidently deemed that the potential conflicts of interest which might arise between a township trustee and volunteer firefighter are outweighed by the

of a political subdivision of this state, and the investment is specifically approved by the investment advisory committee.”

need for firefighters” (citation omitted)); 1977 Op. Att’y Gen. No. 77-034, at 2-123 (“it was the manifest intent of the General Assembly that despite any conclusion of incompatibility arising from the common law analysis, a member of a regional planning commission may also hold any other public office or any of the other positions enumerated in the above revision”). In addition, it is well accepted that “in the absence of evidence to the contrary, public officers ... within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully.” *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955); accord 2013 Op. Att’y Gen. No. 2013-002, at 2-25 to 2-26.

Therefore, in light of the General Assembly’s authorization of the investment and the dual roles played by the county treasurer and members of the board of county commissioners, a conflict of interest does not prohibit a county treasurer, acting as the county investing authority, from investing the county’s inactive moneys in a bond issued by the treasurer’s county. The investment is not prohibited by a conflict of interest even though the county investment advisory committee, which is composed of two county commissioners and the county treasurer, has to amend its investment policies to permit the investment.⁹ A county investing authority may invest inactive moneys of the county in a bond issued by the board of county commissioners of the investing authority’s county even though the county investment advisory committee has to amend its investment policies to permit the investment and the county investment advisory committee is composed of two county commissioners and the county treasurer.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 135.35(A)(4) authorizes a county investing authority to invest inactive moneys of the county in a bond issued by the board of county commissioners of the investing authority’s county.
2. A county treasurer who serves as the county investing authority may invest inactive moneys of the county in a bond issued by the board of county commissioners of the treasurer’s county even though the county investment advisory committee has to amend its investment policies to permit the

⁹ Pursuant to R.C. 102.08, the Ohio Ethics Commission is authorized to render advisory opinions concerning questions relating to R.C. Chapter 102 and R.C. 2921.42-43. *See, e.g.*, 2014 Op. Att’y Gen. No. 2014-002, at 2-11 to 2-12 n.2; 2013 Op. Att’y Gen. No. 2013-034, at 2-347 n.2; 2013 Op. Att’y Gen. No. 2013-002, at 2-18 n.1. Therefore, this opinion does not consider and does not draw any conclusions regarding the applicability of R.C. Chapter 102 and R.C. 2921.42-43 to your questions.

investment and the county investment advisory committee is composed of two county commissioners and the county treasurer.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General