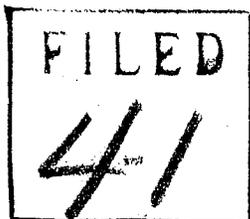


OFFICERS:  
STATE AUDITOR'S DUTY IN  
APPROVING DEPOSITARIES  
FOR STATE FUNDS:



State Auditor's duty in giving approval of depositaries for state funds, selected by State Treasurer under Sec. 30.240, RSMo 1949, requires previous personal investigation of facts, exercise of judgment and discretion, and cannot be delegated to Auditor's chief clerk. After Auditor has investigated facts, exercised personal discretion and judgment, he may delegate duty of affixing his signature to written instrument evidencing his approval, to chief clerk.

July 19, 1954

Honorable Haskell Holman  
State Auditor  
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your recent request for an official opinion, which reads in part as follows:

"Is the Chief Clerk in the Office of the State Auditor permitted to sign deposit approvals for the State Auditor?"

Does this question inquire whether the Chief clerk of the State Auditor can legally sign the Auditor's name to a written instrument evidencing the Auditor's approval of the depositaries for state funds, that is, does the inquiry refer only to the affixing of the signature to such document, or does it inquire whether the chief clerk can legally perform the Auditor's duty in investigating the facts, in exercising discretion and judgment and in finally arriving at a conclusion that such depositaries are proper ones, and then affixing the Auditor's signature to a written instrument showing the latter's approval of such depositaries? Because we are not sure of the exact nature of the question presented, we find it necessary to discuss and answer it in the alternative.

Section 30.240, RSMo 1949, provides how state moneys shall be kept and deposited, and the Auditor's duty in approving depositaries for such funds. Said Section reads as follows:

"All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which

Honorable Haskell Holman

such moneys respectively belong, in such banks, bank or banking institutions in this state as he may from time to time, with the approval of the governor and state auditor, select. The said bank, banks or banking institutions so designated shall give security satisfactory to the governor, state auditor and state treasurer for the safekeeping and payment of such deposits as provided in this act. Such bank, banks or banking institutions shall pay a bonus for the use of such deposits, not less than the bonus paid by other banks for similar deposits and the same together with the interest and profits as may accrue thereon, shall be disbursed by said treasurer for the purposes of the state according to law upon warrants signed by the state auditor and not otherwise; provided, however, that if, at the time when a selection of depositaries is made in accordance with the provisions of this chapter, it shall be unlawful for banks or banking institutions to pay interest upon deposits, the treasurer, with the approval of the governor, and the state auditor shall select as depositaries of state moneys for such period not exceeding four years as may be agreed upon with such depositary or depositaries, such banks or banking institutions as in their judgment would constitute the best, safest and most convenient depositaries, without requiring the payment of any bonus or interest therefor; provided further, that in regard to the selection of depositaries, for the safekeeping and payment of said deposits of state moneys that are in the state treasury, it shall be the duty of the state treasurer to divide the money into such amounts as he may designate and to select as a depositary or depositaries for state funds, which in his judgment, will be safe banking institutions for the protection of state funds, and after the selection of such banking institutions shall be approved by the governor and the state auditor, said depositaries selected shall put up for the security of funds sufficient securities of the kind and character as provided in section 30.270 at least equal in market value to one hundred and ten per cent of the amount of funds in possession of such depositaries, less five thousand dollars where the depositaries are insured by the Federal

Honorable Haskell Holman

Deposit Insurance Corporation, and after having entered into a contract with such depositaries as provided in this act, then the state treasurer may award such sum as he may designate to each such depositary."

(Emphasis ours)

When we consider the "approval" of the depositaries by the State Auditor as referred to in above-quoted Section, other questions naturally present themselves to us such as:

- (1) What is the statutory meaning of "approval"?
- (2) Does the term refer to a discretionary or ministerial duty of the Auditor?
- (3) Can such duty be delegated to the chief clerk, who, after performing same can or cannot sign the Auditor's name to approvals of the depositaries?

We feel that these are basic preliminary questions and have such a direct bearing upon the one of the opinion request that they must be first answered before a correct answer can be given to the one referred to in the opinion request.

It is noted that neither the above-quoted Section nor any others define the word "approval" nor are there any details given in said Section showing the statutory duties of the Auditor in approving state depositaries. From the context of the statute quoted, it appears that the word is used in its common or ordinary sense, as there is no indication that it was to be given a technical meaning.

Webster's New International Dictionary defines the word "approval" as:

- "1. Act of approving; approbation; sanction.
- "2. Specif., examination to determine suitability for acceptance; as, goods sent on approval, that is, subject to a prospective purchaser's decision to accept them or to refuse them by returning within a specified time."

Honorable Haskell Holman

From the dictionary definition of the word "approval", and also reference to the word in Section 30.240, supra, it appears that the Auditor is required to do something more than to merely indicate his agreement or acquiescence in the act of the State Treasurer in the latter's selection of banking institutions in which state funds are to be deposited. It is obvious that the statute requires the State Auditor to make some investigation of the facts regarding the financial standing, security, and suitability of the financial institutions before giving his approval of said institutions. The statute fails to provide a method or procedure for the Auditor to follow in such instances, and he has been left free to choose any such method of procedure he thinks best to follow under the circumstances, and which will satisfy him that the depositaries selected are proper ones for state funds.

The duty calls for the exercise of discretion and judgment by the Auditor and is one, in our opinion, which the lawmakers must have considered to be a very important one to be performed personally by the Auditor. It is our further opinion that if the lawmakers had believed it to be one of less importance, then they undoubtedly would have provided either specifically by the language used or that from which it might necessarily be implied that said duty could just as well be performed by others. Since this is not true, we must conclude that the legislative intent was that such duty was to be performed only by the Auditor.

It might be contended that since the chief clerk is required by statute to be competent to perform the duties of the State Auditor, that the chief clerk could approve the depositaries and sign the Auditor's name to depositary approvals, and that his action in so doing would be as legally binding as if the Auditor had performed said duty personally. Section 29.040, RSMo 1949, provides for the appointment of a chief clerk by the State Auditor and said Section reads as follows:

"The state auditor shall have the power to appoint a chief clerk who shall be thoroughly competent to perform all the duties prescribed by law to be performed by the state auditor. Such appointment, with the oath of office endorsed thereon, shall be filed in the office of the secretary of state before such chief clerk enters upon his duties. Such chief

Honorable Haskell Holman

clerk, when appointed, may perform the duties of the office, but the state auditor and his sureties on his official bond, shall be liable for the official acts, misfeasance or defalcation of such chief clerk."

The only trouble with the possible contention mentioned above is that it ignores the legislative intent shown by Section 30.240, supra, that the State Auditor is to personally perform the duties referred to, and as we have tried to point out in our previous discussion.

Said duty could not be delegated to the chief clerk for the further reason that it requires the personal discretion and judgment of the Auditor, and the general rule is that duties of this nature of a public officer cannot be delegated to another. Said general rule has been stated in Volume 67, C.J.S., page 373 and reads as follows:

"In the absence of statutory authority a public officer cannot delegate his powers, even with the approval of a court. An officer, to whom a power of discretion is intrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where, after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion."

Again in the case of State ex rel. vs Reber, 226 Mo. 229, it was held that the duties of the President of the Board of Public Improvements of the City of St. Louis were of two kinds, namely, discretionary and ministerial. Duties of the first kind could not be delegated to another, while those of the latter kind could be delegated to another. It was also held in said case that tax bills required to be signed by the President and City Comptroller, but which were signed by a clerk in the President's office for the President, were as binding as if they had been actually signed by the President. At l.c. 234 and 237 the court said:

"As has been said already the duties of the president of the board of public improvements are of two kinds, the one is such as

Honorable Haskell Helman

requires the exercise of discretion and judgment, involving often scientific and technical knowledge, the other requires the performance of mere ministerial or clerical work. The duties first mentioned cannot be delegated, those of the ministerial kind may be delegated with proper care."

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"\* \* \* An officer to whom a discretion is entrusted by law cannot delegate to another the exercise of that discretion, but after he has himself exercised the discretion he may, under proper conditions, delegate to another the performance of a ministerial act to evidence the result of his own exercise of the discretion. The clerk cannot pronounce judgment, but he may under direction of the judge make the record evidence of it. In *Porter v. Paving Co.*, 214 Mo. 1, it was held that the signature of the mayor, which the law required to be subscribed to an ordinance to show that it was approved by him, might under the mayor's direction be written by his secretary. We do not mean to say that an officer to whom the performance of even ministerial work is personally entrusted may, under all circumstances, delegate to another the performance of that duty, but we are aiming to draw the distinction in that particular between an official act requiring the exercise of personal discretion or judgment and a mere ministerial act which requires the exercise of no discretion, and to say that whilst the one cannot be delegated the other under certain circumstances may be.

"In the case before us we hold that the acts of signing the names of the president of the board of public improvements and the comptroller are ministerial acts and may under proper conditions be delegated, and we hold that the circumstances of this case render it proper that these officers, with the approval

Honorable Haskell Holman

of the municipal assembly, shown by the ordinances in question, should delegate the authority to sign their names as has been done to these special tax-bills, and we hold that ordinances 24526 and 24527 are valid, and that the bills so signed are as valid as if they had been signed by the president of the board of public improvements by his own hand and countersigned by the comptroller with his own hand."

In view of the foregoing, it is our thought that the provisions of Section 30.240, supra, clearly shows the legislative intent to be that the Auditor shall personally examine the facts relative to the financial standing, security, and general suitability of financial institutions selected by the State Treasurer as depositaries for state funds before giving his approval of such depositaries. Such duties require the exercise of the Auditor's discretion and judgment, and he cannot legally delegate the performance of such duties to his chief clerk. However, once the duty has been personally performed by him, he may delegate the ministerial duty of signing his name to a written instrument evidencing his approval of such state depositaries, and the written approval to which the Auditor's name has been signed by the chief clerk in this manner will be as legally effective as if it had been signed by the Auditor personally.

#### CONCLUSION

It is the opinion of this Department that the duty of the State Auditor in giving his approval of the depositaries for state funds selected by the State Treasurer under the provisions of Section 30.240, RSMo 1949, requires the previous, personal investigation of the facts involved, the exercise of discretion and judgment, and he cannot delegate the performance of said duty to his chief clerk. However, after the Auditor has made the necessary investigation, and has exercised his personal discretion and judgment, and is convinced that the depositaries selected are proper ones, he may delegate the duty of affixing his signature to a written instrument evidencing his approval of said depositaries, to his chief clerk.

This opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Very truly yours,

John M. Dalton  
Attorney General

PNC:lvd