

STATE TREASURER:  
STATE MONEYS:  
DEPOSITARY:

Duty of State Treasurer with respect to  
investment of state moneys not needed  
for current operating expenses.



May 2, 1957

Honorable M. E. Morris  
State Treasurer of Missouri  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an  
official opinion which reads:

"The amendment to the Constitution of the  
State of Missouri, adopted in November,  
1956, which repeals and re-enacts Sec-  
tion 15 of Article 4, relates to the  
State Treasurer and the investment of  
state funds. The provision for moneys  
subject to check is self-explanatory.

"State moneys not needed for current  
operating expenses are to be placed on time  
deposit in Missouri banks or invested in  
United States Government obligations.

"(1) Is it the legal obligation of the  
State Treasurer to obtain the highest  
interest rate available or is it correct  
to follow the present procedure of keeping  
a portion on time deposit in Missouri banks,  
subject to 30 days' notice? This type of  
money earns interest at the rate of 1% per  
annum. The same money in United States  
securities at this time would yield 3 plus  
per cent.

Honorable M. E. Morris

"(2) Copy of Senate Bill #29, which has passed the House and Senate and is now awaiting the signature of the Governor, is enclosed. Should the Governor sign this bill, would it alter your opinion in any way with respect to question '1'?"

Since Senate Bill No. 29 has been signed by the Governor, there now is presented the single question as to what is your duty under the Constitution and that bill.

The pertinent provisions of Article IV, Constitution of Missouri, as amended in 1956, read:

"\* \* \*The state treasurer shall determine by the exercise of his best judgment the amount of state moneys that are not needed for current operating expenses of the state government and shall place all such moneys not needed for payment of the current operating expenses of the state government on time deposit, bearing interest in banking institutions in this state selected by the state treasurer and approved by the governor and state auditor or in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not more than one year from the date of purchase. The investment and deposit of such funds shall be subject to such restrictions and requirements as may be prescribed by law. \* \* \*"

Paragraph 2, Section 30.260, Senate Bill No. 29, reads:

"The State Treasurer shall place the State moneys which he has determined are not needed for current operations of the State government on time deposit drawing interest in banking institutions in this State selected by him and approved by the Governor and the State Auditor, or place them in short term United States government obligations maturing and becoming payable one year or less from the date of issue or in other United States obligations maturing and becoming payable not

Honorable M. E. Morris

more than one year from the date of purchase, as he in the exercise of his best judgment determines to be in the best overall interest of the people of the State of Missouri, giving due consideration to (a) the preservation of such State moneys, (b) the comparative yield to be derived therefrom, (c) the effect upon the economy and welfare of the people of Missouri of the removal or withholding from banking institutions in the State of all or some such State moneys and investing same in obligations of the United States government, and (d) all other factors which to him as a prudent State Treasurer seem to be relevant to the general public welfare in the light of the circumstances at the time prevailing."

The second sentence of Paragraph 2, Section 30.290, Senate Bill No. 29, reads:

" \* \* \* Good faith compliance by the State Treasurer with paragraph 2 of Section 30.260 shall be a full justification for the action of the State Treasurer in the investment of State moneys although different action by the State Treasurer would have yielded a greater return on the State moneys."

The Constitution provides merely that the moneys determined by the State Treasurer not be needed for current operating expenses shall be either deposited in banks on an interest bearing time deposit basis or invested in stated kinds of Government obligations. It does not purport to prescribe any requirements or standards to guide the State Treasurer in determining which disposition he shall make of such moneys. Instead, by providing that the investment and deposit of the moneys which are not needed for current operating expenses shall be subject to such restrictions and requirements as may be prescribed by law, the Constitution expressly leaves this for later determination by the General Assembly and authorizes that body to take such action as it may deem necessary or appropriate in the light of conditions as they exist from time to time. Pursuant to such authority, the above quoted provisions of Senate Bill No. 29 have been enacted; and, whatever may have been the State

Honorable M. E. Morris

Treasurer's duty under the Constitution alone and without any express guide for his action, it is now clear that his duty must be ascertained from such statutory provisions.

Senate Bill No. 29 requires, in Section 30.260 (2) that, in determining what disposition to make of the moneys in question, the State Treasurer shall consider various matters in addition to comparative yield. The matters specifically mentioned are "the preservation of such State moneys" and "the effect upon the economy and welfare of the people of Missouri of the removal or withholding from banking institutions in the State of all or some such State moneys and investing same in obligations of the United States government." Also, there is the "catch-all" provision requiring the State Treasurer to consider "all other factors which to him as a prudent State Treasurer seem to be relevant to the general public welfare in the light of the circumstances at the time prevailing."

It is not necessary for the purposes of this opinion to attempt to discuss in detail the matters which the State Treasurer is specifically required to consider or to speculate with respect to those which might be deemed to be relevant under the "catch-all" provision. It will suffice to say that the conclusions which may reasonably be reached on the basis of the matters other than comparative yield may, in some circumstances, at least, be inconsistent with obtaining the highest rate of interest on the moneys.

This was recognized by the General Assembly when it provided that anything other than comparative yield should be considered; and, by requiring consideration of such other matters, the General Assembly clearly provided that it should not, as a matter of law, be the duty of the State Treasurer always to obtain greatest possible return on the moneys. In the exculpatory provision contained in Section 30.290 (2) of Senate Bill No. 29 the General Assembly further emphasized this fact by providing that good faith compliance with the pertinent provisions of Section 30.260 shall be full justification for action of the State Treasurer "although different action by the State Treasurer would have yielded a greater return on the State moneys." The rate of interest, or yield is just one of the matters to be considered by the State Treasurer, and nothing more.

Under Senate Bill No. 29, it is the State Treasurer's duty to take such action "as he in the exercise of his best judgment determines to be in the best overall interest of the people of

Honorable M. E. Morris

the State of Missouri," after consideration of the matters mentioned above. Broader discretion could hardly have been vested in the State Treasurer. Aside from comparative yield, the matters which are to be considered are of a kind concerning which intelligent, informed persons, with a given state of facts, may honestly reach different conclusions. Also, as already indicated, a conclusion based on one of such matters alone may conflict with those based on the others; and nowhere is there any guide as to the relative weight to be given to the various matters. Where such a conflict exists, it might be determined that the money should be partly deposited in banks and partly invested in Government obligations; but this would not necessarily be true and a weighing of the various considerations might lead to a determination that the moneys should be placed all in time deposits or all in Government obligations. Moreover, there is an ever-changing factual situation, so that determinations which are made must be under constant review. Whatever arguments may be made pro and con with respect to various courses of action, someone must have the responsibility for making final decisions as to what is in the best interests of the people of the State under the facts as they exist from time to time; and the statute places that responsibility on the State Treasurer. When he in good faith exercises his best judgment, and acts according, he has fully performed his duty.

As noted above, Section 30.290 (2) of Senate Bill No. 29 expressly provides that good faith compliance with Section 30.260 (2) shall be full justification for the State Treasurer's action even though a greater return might have been obtained by different action. Thus, it protects the Treasurer against liability based merely upon contentions that some other course of action would have been wiser and more beneficial to the State. In making good faith determinative, the statute is in accord with generally accepted principles which would have been applicable even in the absence of such express provision.

Where such discretion is vested in an official in the executive branch of the government, the courts will not instruct the official as to how he shall exercise such discretion and, in the absence of evidence of bad faith, fraud, or flagrant abuse tantamount to failure to exercise discretion, the courts will not interfere with the official's actions or impose any liability upon him for his actions. As is frequently stated, a court will not substitute its judgment for that of an official vested with discretion merely because it would have reached a different conclusion.

In the case of State ex rel. Shartel v. Westhues, 93 SW2d 612, the Missouri Supreme Court had occasion to consider the

Honorable M. E. Morris

question as to what authority the courts have with respect to the performance of a discretionary duty by a State official. There the Secretary of State had the duty to arrange for the publication of certain notices and, in doing so, to "accept the most advantageous terms that can be obtained." A suit was brought to require the Secretary of State to take competitive bids for the publication of the notices. The lower court held that in view of the discretion vested in him, the Secretary of State was not required to obtain bids, but the court in its decree went on to tell the Secretary of State in considerable detail how he should exercise his discretion. In its review of the case, the Supreme Court held that the lower court had no such authority and, in its opinion, stated:

"VII. The requirement of section 10402, R.S. 1919, that the officer 'shall accept the most advantageous terms that can be obtained,' imposes upon such officer the right and duty to exercise an official discretion. Respondent held that the secretary of state was under no duty to submit the publication of the proposed constitutional amendments to competitive bidding or even to accept the lowest bid, if any such bids were received. The statute does not define the words 'most advantageous terms.' It left it to the secretary of state to determine for himself what terms are most advantageous and to accept the terms he deems to be most advantageous. The statute has not provided that the advantageousness of the terms offered to the officer shall be determined by the number of readers of the given newspaper, nor by its circulation in a particular county, nor by the price to be charged for the publication, nor by the relation of that price to the maximum price authorized by new Section 10401; nor does section 10402, R.S. 1919, provide at what time the secretary of state shall determine the advantageousness of the terms offered to him, nor even that the secretary of state shall peddle the publication from one newspaper office in the county to another in order to ascertain all or any of these facts. In short, the General Assembly has not defined the words 'most advantageous terms.'

Honorable M. E. Morris

"Respondent held that the secretary of state had a discretion, which it was his right and duty to exercise. Respondent then proceeded to advise the secretary of state how he should exercise such discretion, to wit:

"That he must exercise that discretion and select those papers that give the widest publicity at rates which are reasonable and in exercising this discretion he must protect the interests of the State financially, as well as otherwise."

"It may be that the secretary of state should take all the things specified by respondent into consideration in exercising his official discretion, but the declaration of his duty in that respect must come from the legislative and not the judicial department of our state government."

\* \* \*

"It cannot be said on this record that the acts and conduct of the secretary of state in proposing (as it is stipulated) 'to designate a newspaper in each county of the state and in the city of St. Louis in which the proposed amendments to the Constitution should be published \* \* \* without taking or receiving competitive bids for such publications or taking or receiving statements from the publishers of such newspapers as to the price to be charged and paid therefor' amount to such fraudulent conduct and abuse of official discretion as to give to the courts the right to control the discretion of the secretary of state. The only facts before us are the stipulated facts just referred to. The secretary of state may have determined from sources other than statements of the publishers of newspapers facts which influenced his official discretion in accepting as most advantageous the terms of such newspapers for publishing the proposed constitutional amendments.

Honorable M. E. Morris

"Respondent did not find that the secretary of state was about to exercise his discretion fraudulently, so that no discretion would, in fact, be exercised by him, but quite obviously undertook to substitute his judgment for that of the secretary of state as to what consideration should control that officer in the exercise of his official discretion. This the trial court had no power to do. The secretary of state is an officer of a department of the state government, separate and distinct from the judicial department. In the absence of fraud, the exercise of his official discretion cannot be controlled by the judicial department. The legislative department may lay down rules for the guidance of the secretary of state in the performance of this duty, if so advised. Certain it is that the circuit court of Cole county had no power to interfere in the exercise of the discretion intrusted to the secretary of state upon the facts contained in the record before us, which record is stipulated here as the record before respondent when he entered the judgments complained of."

In the statute now under consideration, the General Assembly has directed that the State Treasurer take certain matters into consideration but it has left with him an extremely wide range for exercise of discretion in determining what is in the "best overall interest of the people of the State;" and it seems that clear that, even without the exculpatory provision found in Section 30.290 (2), the courts, following the opinion in case cited above, would not interfere with or review the action of the State Treasurer in the absence of evidence of bad faith.

#### CONCLUSION

With respect to State moneys not needed for current operating expenses, there is vested in the State Treasurer broad discretion to determine, after consideration of various matters enumerated in the statute, whether it is in the best overall interest of the people of the State of Missouri to place them in interest-bearing time deposits in banks or invest them in specified types

Honorable M. E. Morris

of United States obligations. Comparative yield is only one of the matters which the Treasurer is required to consider, and it is not his duty, as a matter of law, to obtain the highest rate of interest that is obtainable. The courts will not interfere with or review the action of the State Treasurer, in the absence of evidence of his failure to exercise his discretion in good faith.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Baumann.

Yours very truly,

John M. Dalton  
Attorney General

JCB:vlw