

From the foregoing I am of the opinion that a consolidation under the Acts of 1955, Ch. 15, may or may not give tenure rights to a teacher serving in such consolidated school dependent upon whether or not the resolution classifies the school corporation as having the power and authority of a township school corporation or those of a city school corporation. In the first instance, tenure rights would not be afforded; in the latter instance, they would be enforceable.

I am also of the opinion that consolidations effected under either the Acts of 1949, Ch. 226, *supra*, or as amended by the Acts of 1957, Ch. 349, Sec. 1, *supra*, result in such consolidated schools having the classification of city school corporations and that tenure rights are afforded teachers teaching in such consolidated schools.

OFFICIAL OPINION NO. 50

November 21, 1957

Mr. T. M. Hindman
State Examiner
State Board of Accounts
304 State House
Indianapolis, Indiana

Dear Mr. Hindman:

In your letter to this office you stated certain facts concerning funds of the City of Kendallville and the municipally-owned electric light utility of that City, and requested my opinion in respect to the following questions:

"(1) If the cash received by transfer from the electric utility to the general fund is included in the 1958 budget adopted by the city for its general fund and such cash although obligated by an appropriation will not be expended until on or after March 1, 1958, can the city invest all or any part of this in government securities pursuant to Section 61-677, Burns' Statutes?

"(2) If a portion of the cash proceeds received from the sale of the municipal electric utility is placed in the general fund and is appropriated in the 1958 budget for sewers and enlargement of the sewage disposal

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plant and no expenditures will be made on the project until after March 1, 1958, can the city invest all or any part of this cash so obligated in government securities pursuant to Section 61-677, Burns' Statutes?"

Although you state that the cash on hand in the municipal electric utility department "is also transferred to the general fund of the city," it appears from your letter that such funds at the present time are not yet so transferred, although the city has appropriated such funds in its 1958 budget as anticipated revenue.

At the outset of this problem we must recognize the basic law declared by the Supreme Court of Indiana, that in the absence of a statute authorizing it, no public agency has the right to loan the public funds.

Storen, State Treasurer v. Sexton, Marion County
Treasurer (1936), 209 Ind. 589, 598, 200 N. E. 251.

The Court, in the above case, further declared as follows:
(p. 598)

"* * * The legislature may provide that current funds shall not be deposited in bank, but that they be held in public treasuries without interest until they are appropriated to the purpose for which they are intended. It may provide that they shall be deposited in banks, fixing the interest which shall be paid. It may change the rate of interest, as conditions may suggest the necessity of such a change, or require the withdrawal of deposits previously made, if, in the judgment of the legislature, that may seem advisable for the safety of the fund. The Constitution does not require that public funds shall be deposited in bank, nor that, if deposited, they shall earn interest. Those matters lie within the legislative discretion, and that discretion cannot be controlled by the courts. * * *"

It is required that all public funds paid into the treasury of the municipal corporation shall be deposited daily in one or more depositories in the name of the state or municipal corporation by the officer having control thereof.

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Acts of 1937, Ch. 3, Sec. 3, as found in Burns' (1951 Repl.), Section 61-624.

The Depository Act, *supra*, contains no authority for the payment or receipt of interest on the deposit of public funds, but it is not in conflict with other provisions of law authorizing municipalities to invest parts of the funds of municipally-owned utilities.

1938 O. A. G., pages 427, 432.

It is the duty of the city controller in cities of the first, second and third classes, "to manage and direct the finance and accounts of the city and to make investments of city funds, subject to the ordinances of the common council."

Acts of 1905, Ch. 129, Sec. 88, as amended, and as found in Burns' (1950 Repl.), Section 48-1602, cl. Seventh.

In cities of the fifth class the clerk-treasurer has the duties provided by law for the office of city controller.

Acts of 1933, Ch. 233, Sec. 8, as amended, and as found in Burns' (1957 Supp.), Section 48-1219.

The Acts of 1945, Ch. 9, Sec. 1, as found in Burns' (1951 Repl.), Section 61-677, which you mention specifically in your letter, reads as follows:

"The state board of finance of the state of Indiana, the board of county commissioners of each county of the state and the governing body of each city, town, township, school city, school town and any other political subdivision of the state may by an ordinance or resolution authorize the proper legal officers to invest and reinvest any money which shall include money raised by bonds issued for a future specific purpose, sinking funds, depreciation reserve funds, and gift, bequest or endowment, which are under the control of any department, board, commission or utility of the state or of any unit of government within the state, in the bills, certificates of indebtedness, notes, and bonds of the United States of America: Provided, however,

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that no such investment shall be made at a cost in excess of the par value of the securities purchased; and Provided further, that none of the funds shall be invested in any securities the maturity date of which is later than the time when such funds are required to be available for the purposes thereof as provided by law, if such time can be determined, otherwise such investments shall be made only in securities having a maturity date one (1) year or less from the date of purchase or subscription. Any interest or other accretions derived from any such investments shall become a part of the funds invested. The state or any other unit of government by the same authority under which the investments were made, may sell any securities so acquired and are hereby authorized to do any and all things necessary to protect the interests of the funds so invested. The treasurer of state and the treasurers of the several subdivisions of the government shall be the legal custodians of any securities acquired under the provisions of this act."

The title of the same act reads as follows:

"An Act authorizing the investment of *certain* funds of the state and political subdivisions thereof in *certain* obligations of the United States, validating *certain* investments already made, and declaring an emergency." (Our emphasis)

It is to be noted that in Burns' Section 61-677, as above quoted, the all-inclusive phrase "any money" is immediately followed by specific mention of different types of funds already impressed with a future purpose and need—funds already set apart as distinguished from the general fund of the particular unit of government. The use of moneys in such funds for any other purpose, including that of investment, might still be questioned by some unless specifically mentioned in the act.

In the case of Department of Treasury of Indiana v. Muessel *et al.* (1941), 218 Ind. 250, 255, 32 N. E. (2d) 596, the Court had the following phrase under examination:

"and all receipts by reason of the investment of capital, including interest, discount, rentals, royalties, fees,

commissions or other emoluments, however designated."

Concerning this phrase, and the nature of the word "including," the Court declared:

"* * * We are of the opinion that 'including' as here used is a word of limitation and that the words 'interest, discount, rentals, royalties, fees, commissions and other emoluments, however designated' designate the type of receipts from the investment of capital which the Legislature intended to tax by this provision, namely all types of profits or earnings."

In the case of *The Title Guaranty and Surety Company of Scranton, Pennsylvania v. State of Indiana ex rel. The Leavenworth State Bank* (1915), transfer denied March 17, 1916, 61 Ind. App. 268, 279, 109 N. E. 237, 111 N. E. 19, the Court was concerned with the following phrase in a contractor's performance bond which was the basis for the action:

"shall promptly pay all debts incurred by them in the prosecution of said work, including labor, materials furnished * * *."

The bank had entered into an agreement with the contractors to advance the money to be used in the payment of the claims for labor and material as needed, without any agreement with the laborers and materialmen for the assignment of their claims. The contractors contended that a new indebtedness thereby was created not included within the phrase above quoted. However, the Court stated as follows: (p. 279)

"We are required to ascertain, first the relation existing between the ideas expressed respectively by the words 'all debts incurred,' etc., and 'labor, materials furnished,' etc., as indicated by the word 'including.' The connection in which this word is used under various circumstances may shape its meaning somewhat. Under some circumstances, or in some connections, perhaps, it may be used as a word of limitation or enumeration; that is, to the effect that certain specific things mentioned comprise all of the class designated by some

general expression. In the quoted provision of the bond here, the word 'including', in our judgment, is used to express the idea of a class comprehending as a part of its members certain things specifically mentioned or to which particular attention is directed; that is, the class indicated by the expression 'debts incurred', etc., is not necessarily exhausted by the specific debts referred to as growing out of labor performed or material furnished. The purpose as expressed by the bond is to secure the payment of debts incurred in the prosecution of the work. Among such debts are those growing out of labor performed and material furnished. But if there are other debts, regardless of their nature or origin, that sustain such an intimate, immediate and exclusive relation to the building of the road that it may be said that such debts were incurred in the prosecution of that work, they too are covered by the provisions of the bond literally interpreted. See Montello Salt Co. v. State (1911), 221 U. S. 452, 31 Sup. Ct. 706, 55 L. Ed. 810, Ann. Cas. 1912D 633, 22 Cyc. 62, notes; 4 Words and Phrases, 'including' 3500."

In the Muessel case, *supra*, the *genus* was "all receipts by reason of the investment of capital," and the subsequent delineation was apparently intended to specify all things which belonged therein. In such case a doubtful thing such as the return of the capital itself was apparently and logically excluded.

In the Leavenworth State Bank case, *supra*, the *genus* was "all debts incurred by them in the prosecution of said work," and the subsequent delineation obviously did not and was not intended to exhaust the same.

In regard to the statute in question in this opinion, Acts of 1945, Ch. 9, Sec. 1, as found in Burns' (1951 Repl.), Section 61-677, *supra*, the *genus* is "* * * any money * * * under the control of any department, board, commission or utility of the state or of any unit of government within the state," and it does not appear that the delineation of particular funds constituted an attempt on the part of the General Assembly to specify all such money, but rather that it specifically directed attention to certain funds. Under such circumstances it can-

not be said that the authority to invest is limited to the specific funds named or funds of like nature.

Cunningham v. Sizer Steel Corp.; Fidelity Trust Co. of Buffalo v. Sizer Steel Corp. (1924), 1 Fed. (2d) 337, 338;

See also: Cannon v. Nicholas, Collector of Internal Revenue (1935), 80 Fed. (2d) 934, 936.

In the latter case cited, the Collector had been authorized by statute to collect by distress or sale "the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt" of the delinquent taxpayer. The contention was made that this authority only applied to such intangible property as was mentioned, particularly in view of the fact that "bank accounts" had been added to the statute by amendment. But the Court held that although the word "including" is sometimes a word of restriction, it was obviously used in this connection from an excess of caution, to point out certain classes of property which Congress was fearful a collector might overlook.

I do not believe that the principle of *ejusdem generis* is applicable. Its usual application is in the situation where a general catch-all phrase is preceded by the enumeration of specific things, which is not true in this case. The position of the general phrase is important,

Sherfey v. City of Brazil (1937), 213 Ind. 493, 500, 13 N. E. (2d) 568

and the doctrine itself is merely one of a number of helpful aids used in the various methods of reading the meaning intended where vagueness and uncertainty are claimed to exist.

Woods v. State (1957), — Ind. —, 140 N. E. (2d) 752, 753.

If the words "funds" and "money" were considered synonymous it might appear that the title of this act, in the use of the phrase "certain funds," has limited the scope of the act necessarily to only those funds named. However, the word "certain" is used three times in the title: "certain funds,"

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"certain obligations of the United States," and "certain investments already made." In the case of "certain obligations of the United States" the enumeration in the body of the act is as follows:

"Bills, certificates of indebtedness, notes and bonds
* * *."

This enumeration is general and complete. In the case of "certain investments already made," the enumeration in the body of the act is as follows:

"* * * all acts and orders of the legal officers of any unit of government in the state of Indiana, heretofore made whereby the funds of any such unit of government or the funds which are under the control of any department, board, commission or utility thereof, have been invested in the bonds, notes, certificates of indebtedness and other valid obligations of the United States, or in the bonds, notes, debentures and other securities issued by any federal instrumentality and fully guaranteed by the United States, are hereby legalized and declared valid." [Burns' 61-679, *supra*.]

This is likewise general and complete as to all investments already made in obligations of the United States. In view of the use of the word "certain" in respect to these other parts of the act, I cannot conclude that it was the intent of the Legislature to use the word in the strict sense of limitation. One accepted meaning of the word in such a situation is "not specifically named, indeterminate, indefinite."

Willite v. Armstrong (1931), 328 Mo. 1064, 43 S.W. (2d) 422, 423.

The receipt of a note as collateral security for "certain notes" held by the recipient against the giver, means all notes and not a particular portion or description of those notes of the giver in the hands of the receiver.

Martin v. Bell (1840), 18 N.J. (3 Har.) 167.

The word "funds" is generic and all-embracing as compared with the term "money." As declared by the Supreme Court of Indiana:

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"A *fund* may be denominated a deposit or accumulation of resources from which supplies are drawn, out of which expenses are provided, or which may be available for the payment of debts or the discharge of liabilities. The assets of an estate constitute a *fund* in the hands of the executor or administrator, which, in certain cases, he may be required to bring into court. There are, however, many kinds of assets which it would be both unsuitable and impracticable to bring into court.
* * *" (Our emphasis)

Jewett *et al.* v. The State *ex rel.* Harrod (1883), 94 Ind. 549, 552.

It appears that the only limitation intended was the limitation to money, under the control of the State Board of Finance or the governing body of any department, board, commission, utility or unit of government within the state, which money is not required for use prior to the maturity date of the obligations which are proposed to be purchased or received for investment purposes.

In conclusion, therefore, I am of the opinion that the money referred to in each of your two questions can be invested pursuant to Burns' 61-677, *supra*.

OFFICIAL OPINION NO. 51

November 22, 1957

Mr. William C. Stalnaker, Director
Indiana Employment Security Division
141 South Meridian Street
Indianapolis, Indiana

Dear Mr. Stalnaker:

Your letter of October 29, 1957, has been received and presents the following factual information.

Your Division has, for the past twenty years, by means of classified advertisements in local newspapers, disseminated information to the general public concerning job opportunities, all of which was pursuant to the provisions of the Indiana Employment Security Act. However, Acts of 1957, Ch. 16,