On July 1, 1962, the school teacher was entitled to a credit in the newly created community school corporation of twenty (20) days as the obligation of the school city corporation and of forty (40) days as the obligation of the township school corporation, both of which obligations were required by law to be assumed by the community school corporation.

Specifically, the teacher in your question revived and acquired his tenure status as of July 1, 1962 by the newly created community school corporation assuming the liabilities and obligations of the school corporations merged into one, and similarly the teacher was entitled to a credit of sixty (60) days accumulated sick leave as of July 1, 1962 in the newly created community school corporation.

OFFICIAL OPINION NO. 46

December 30, 1966

COUNTY OFFICERS—Contracts Between Banks Having Data Processing Equipment and Local Units of Government—Liability in Case of Error or Other Misfeasance.

Opinion Requested by Mr. Richard L. Worley, State Examiner, State Board of Accounts.

This is in response to your inquiry concerning a contract between a county hospital and the data processing center of a bank, other than its duly designated depository, for the preparation and use of the bank's official checks or drafts for payroll purposes pursuant to Acts 1965, ch. 42, Burns IND. STAT. ANN., §§ 18-2016 and 18-2017 (hereinafter referred to as the "Bankers' Act").

The county hospital in question is operating under Acts 1917, ch. 144; Burns IND. STAT. ANN., §§ 22-2115—3156 (hereinafter referred to as the "1917 Act").

You indicate that pursuant to the Bankers' Act forms have been prepared by county hospitals for your approval which adapt several different methods of utilizing the services of banks or trust companies. These include a contractual provision requiring the bank to keep the payroll records of employees which would include deductions and withholding. The bank would fill out the checks except for the payor's signature and return the checks to the local official for his signature and delivery.

Another type of contract would require the treasurer to deliver a warrant covering the net payroll to the bank which the bank would deposit in its general fund. The bank would then draft the payroll checks which would be signed by it drawing on its fund.

The Bankers' Act, Burns §§ 18-2016 and 18-2017, provides: Burns IND. STAT. ANN., § 18-2016:

> "Any local officer and any municipal corporation shall have the authority and power to contract with a bank or trust company for the preparation, drawing, issuing and mailing of checks or drafts (including the official checks or drafts of such bank or trust company issued on behalf of such municipal corporation), statements and notices, and for any other clerical, bookkeeping, accounting, statistical or similar functions by the bank or trust company for and on behalf of and as the official act of the local officer or municipal corporation."

Burns IND. STAT. ANN., § 18-2017, provides:

> "As used in this act, and unless a different meaning appears from the context:
>
> "(a) The term 'local officer,' or the plural thereof, means any person or persons elected or appointed to any office in any municipal corporation in the state of Indiana and includes all boards, commissions, depart-

ments, institutions and other bodies established by law to function as a part of the government of any such municipal corporation, but the term shall not include any state officer.

"(b) The term 'municipal corporation,' or the plural thereof, means all political subdivisions or municipal corporations of the state of Indiana, including, but not in limitation of the foregoing, counties, cities, towns, townships, school cities, school towns, school townships, taxing districts and special assessment districts.

"(c) The term 'bank or trust company,' or the plural thereof, means any national banking association formed under the laws of the United States with its principal office located in the state of Indiana and doing business herein, and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company, or trust company organized and doing business under the provisions of any law of this state. The phrase 'bank or trust company' shall also include a bank service corporation having its principal office in the state of Indiana and organized as authorized by the laws of the United States or organized under and pursuant to the Acts of 1963, chapter 359."

County hospitals operating under the 1917 Act are governed by a board of hospital trustees appointed by the board of county commissioners. The county treasurer is the treasurer of the board of trustees unless such board has decided, with the approval of the board of county commissioners, to elect its own treasurer. When the county treasurer is the treasurer of the hospital's board of trustees, the county auditor also has fiscal duties to perform for the hospital.

Burns 18-2017 is a general statute obviously intended by the Legislature to give governmental agencies and units the power to take advantage of modern data processing equipment. Such equipment provides for efficient and expedient handling of governmental accounting. Most governmental units are prohibited by costs from having their own data

processing equipment. The result is that several governmental units utilize the services of a bank of sufficient size to maintain such equipment. The need for such arrangements was recognized by the Legislature in enacting Burns § 18-2016.

The enactment, however, raises the following questions concerning its application:

1. Whether a contract between a governmental unit and a bank for the handling of the former's payroll and accounts payable must be in writing.

2. Whether the accounting forms and procedures which are the subject matter of the contract between the bank and the local officials must be approved by the State Board of Accounts.

3. Whether the local officials desiring to establish such a procedure under Burns § 18-2016 must request bids in accordance with Burns § 22-3156.

4. Which local officials must be made parties to such a contract?

5. Whether the local officials and their sureties are liable for error or misfeasance by the bank or its employees.

6. Whether the Public Depository Law applies to any funds transferred by a local official to a bank under Burns § 18-2016.

7. Whether the cancelled checks drawn by the bank on its fund under Burns § 18-2016 are the property of the bank or are public records which are the property of the governmental units served by the contracting offices.

I.

The first question for consideration is whether the contract must be in writing.

It is a general rule that a contract with a county need not be in writing nor recorded, *Lockyear v. Board of Comm'rs.*, 180 Ind. 464, 103 N.E. 100 (1913), unless specifically required by statute. The same rule applies to municipal corporations. *Hamilton v. City of Shelbyville,* 6 Ind. App. 538, 33 N.E. 1007 (1893); *City of Logansport v. Dykeman,* 116 Ind. 15, 17 N.E.

587 (1888); *Ohio Oil Co. v. Michigan City,* 117 F. 2d 391 (7th Cir. 1941).

Burns § 22-3118 requires that "Such board of hospital trustees shall hold a meeting at least once each month, shall keep a complete record of all its proceedings. . . ." The Supreme Court has held that where a statute requires the recording of proceedings and a person is employed pursuant to statutory power and such employment is generally recorded as a part of the proceedings, there is a valid and binding written contract. *Kirmse v. City of Gary,* 114 Ind. App. 558, 51 N.E. 2d 883 (1943). By contrast the same court has held that a council resolution directing the mayor to act is not a binding contract for want of mutuality. *Carskaddon v. City of South Bend,* 141 Ind. 596, 39 N.E. 667 (1895). Contracts entered into in such a manner may also fail for ambiguity, for a contract must be reasonably definite and certain in its terms and subject matters. *Cassidy v. Montgomery Ward & Co.,* 216 Ind. 490, 25 N.E. 2d 235, 129 A.L.R. 766 (1940); *Keith v. Crump,* 22 Ind. App. 364, 53 N.E. 839 (1899). The distinctions, however, in the *Kirmse* case and the *Carskaddon* case are academic for the purposes of this opinion since the question is not whether a written contract results from the recording of the board's minutes, but whether a written contract is required by the law.

The word "contract" as used in Burns § 18-2016 must be interpreted to mean a written contract. The subject matter of such contract, by its very nature, dictates that it be in writing. An agreement of this nature envisions the use of large sums of money, and disposition of duties and obligations among the parties for a large scale accounting operation for the public. The sum of money involved alone would be sufficient to dictate a written contract, but when that factor is considered in conjunction with the varied and complex duties involved in such an accounting operation, the necessity for a written contract becomes manifest.

Further, it becomes difficult to conceive how the State Board of Accounts could properly consider and approve accounting systems and procedures established by an oral contract.

It is therefore my opinion that contracts entered into under Burns § 18-2016 must be in writing.

II.

The next question for consideration is whether the accounting forms and procedures which are the subject matter of the contract between the bank and the public officials must be approved by the State Board of Accounts.

The State Board of Accounts has been charged by the Legislature with the duty of prescribing and approving accounting systems to handle the accounts receivable and payable of state and local political bodies. They are also given the duty of prescribing the various forms which are incidental to the performance of the accounting function. The obvious intent of the Legislature was to ensure the establishment of a uniform accounting system for political institutions that conforms to generally accepted accounting principles.

Three statutes place an approval duty on that state agency.

Burns IND. STAT. ANN., § 49-924 provides:

> "On and after January 1, 1948, all accounts or vouchers of any political subdivision of the state for personal services of officers and employees shall be made in such form as may be prescribed by the state board of accounts."

Burns IND. STAT. ANN., § 60-202, provides:

> "The state board of accounts, with the approval of the governor and the auditor of state, shall formulate, prescribe and install a system of accounting and reporting in conformity with the provisions of this act, which shall be uniform for every public office and every public account of the same class, and which shall exhibit true accounts and detailed statements of funds collected, received and expended for or on account of the public for any and every purpose whatever, and by all public officers, employees or other persons, and which shall show the receipt, use and disposition of all

public property, and the income, if any, derived therefrom; and shall show all sources of public income and the amounts due and received from each source, and shall show all receipts, vouchers and other documents kept, or that may be required to be kept, necessary to separate to itself and prove the validity of every transaction; and they, with the approval of the governor and auditor of state, shall formulate all statements and reports made or required to be made for the internal administration of the office to which they pertain, and all reports published or that may be required to be made or published for filing in the office of state examiner or for the information of the people, regarding any and all details of the financial administration of public affairs; and they, with the approval of the governor and auditor of state, shall from time to time make and enforce such changes in the system and forms of accounting and reporting as shall by them be deemed wise or as may become necessary in order to conform to law."

Burns IND. STAT ANN., § 60-224, provides:

"It is hereby made the duty of the various officers of the state and its institutions and municipalities to adopt and use the books, forms, records and systems of accounting and reporting that shall be adopted by the board of accounts, when directed so to do by said board, and all forms, books and records necessary thereto shall be purchased by said officers and in the manner now provided by law. Any officer or person who shall refuse to provide such books, forms, or records, or who shall fail or refuse to use them, or who shall fail or refuse to keep the accounts of his office as directed by said board as provided herein, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars and removed from such office."

Particular emphasis must be placed upon Burns § 49-924 requiring the accounts and vouchers to be in such form as the

State Board of Accounts may prescribe. That statute alone suffices to require their approval of the accounting forms established in contracts such as the ones under consideration. Burns §§ 60-202 and 60-224 simply reinforce that requirement.

Burns § 18-2016 does not eliminate the requirement of such approval. It is silent on Board of Accounts approval; it does not say such approval is required. The statutes are, however, not in conflict, but may exist harmoniously. To require the State Board of Accounts to approve such forms and procedures does not detract from the purpose and functions of Burns § 18-2016.

It is, therefore, my opinion that the accounting forms and procedures established in contracts entered into between banks and local officials under Burns § 18-2016 must be approved by the State Board of Accounts.

III.

The question also arises from your query whether the local officials desiring to utilize the system provided by Burns § 18-2016 must request bids in accordance with Burns § 22-3156.

Burns IND. STAT. ANN., § 22-3156 provides:

> "The governing board or board of trustees of such hospitals shall receive bids for the purchase of all materials costing over two thousand dollars ($2,000.-00) after the giving of notice thereof by publication in one (1) newspaper printed and of general circulation in the county where the hospital is located."

The question turns on whether the service contracted for under Burns § 18-2016 constitutes the purchase of materials. "Materials," as used in this statute, has been interpreted to mean "any and all personal property of every kind and description." 1965 O.A.G. No. 49, p. 257.

If the contracts here under consideration were merely for the purpose of buying the bank's checks, they would obviously constitute materials, thereby requiring the local officials to comply with the bidding requirements of Burns § 22-3156.

Such an interpretation, however, of these contracts would be misleading and inaccurate.

The purpose of Burns § 18-2016 is not the mere purchase of bank drafts by a local political body. Nor is this the subject matter of such a contract when it is viewed as a whole.

Both the statute and the contracts are, in the final analysis, for the performance of a service. The bank is selling an accounting service; documents, including checks, are merely a secondary aspect of that service incidental to its performance. They are in substance contracts for personal services. Personal services are not, in my opinion, materials within the meaning of Burns § 22-3156.

It is, therefore, my opinion that contracts under Burns § 18-2016 are not subject to the requirements of Burns § 22-3156 and need not be bid upon.

In this connection, it should also be noted that in any type of checking account, some checks will remain outstanding for a long period of time, and some will never be cashed. In the case of contracts which provide that the public officer shall draw a check to the contracting bank, and the bank will in turn write checks on its own funds for and on behalf of the public officer, the funds to pay any checks outstanding and uncashed for a period of time will remain with the funds of the bank until such time as they are returned to the public official. Although the bank will, no doubt, under accounting forms and procedures approved by the State Board of Accounts, report periodically on the checks outstanding when it is performing services under this type of contract, and would, of course, pay over the funds guaranteeing the payment of outstanding checks when demanded by the public officials for whom it is performing services, public policy would require that the bank and the public official establish, in the contract, an automatic pay-over of funds guaranteeing every check which has been outstanding for a specified period of time.

Acts 1909, ch. 55, § 9, as amended by Acts 1945, ch. 176, § 3, Burns § 60-211, requires the State Examiner, who is the principal officer of the State Board of Accounts, to examine all accounts and financial affairs of every public office and officer

and institution at least once a year. This yearly auditing requirement suggests that in no event should the period for the bank's retention of funds to pay any outstanding check exceed the period of one year from the date of that check. No doubt the State Board of Accounts can establish forms for such checks which will indicate to the payee that the funds on which the check is written will revert to the public official at the end of twelve months, after which time the payee may collect directly from the public official until the statute of limitations has run.

IV.

It is normal practice to include as parties to a contract those persons having a direct interest therein in that they are bound by the covenants or are direct recipients of another party's duties.

It is my opinion that the county treasurer, county auditor, and the members of the board of hospital trustees would have to be made parties to the contractual undertaking heretofore proposed for a hospital operating under Burns § 22-3118. Each is vested with a material interest in the subject matter of such a contract so as to require his direct participation.

The trustees, auditor, and treasurer have fiscal responsibilities and functions under Burns § 22-3118, providing:

> ". . . The county treasurer of the county in which such hospital is located shall be the treasurer of the board of trustees. Except as provided in this act, the treasurer shall receive and pay out all moneys under the control of the said board, as ordered by it, but shall receive no compensation from such board. . . . "They [board of hospital trustees] shall have the exclusive control of the expenditure of all moneys collected to the credit of the hospital fund, and for the purchase of site or sites, the purchase or construction of any hospital building or buildings, and the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose: . . ."

If the hospital has its own treasurer pursuant to Burns § 22-3119, then both the trustees and the hospital treasurer have a material interest requiring participation in the contract.

Burns § 18-2016 provides for the delegation of duty to the bank by the contracting officials in stating that the bank shall act "for and on behalf of and as the official act of the local officer or municipal corporation." The bank will thus act in the capacity of the officials making the contract with it. Therefore, in order for the bank to act for an official, that official must be one of the contracting parties.

V.

The next question posed for consideration is whether the local officials and their sureties would be liable for error or misfeasance by the bank or its employees.

This question must be answered in the affirmative.

The general doctrine of respondeat superior, *Commercial Union Assur. Co. v. State ex rel. Smith,* 113 Ind. 331, 15 N.E. 518 (1888), was codified in Burns § 49-503, making county officials liable on their bonds for wrongful acts by their deputies. *Southern Sur. Co. v. Kinney,* 74 Ind. App. 205, 127 N.E. 575 (1920). The official liability is not predicated upon fault, but is strict in nature. *Halbert v. State ex rel. Bd. of Comm'rs.,* 22 Ind. 125 (1864).

The county treasurer and county auditor are required to be bonded under Burns §§ 49-3101 and 49-3003. Trustees, superintendents and other employees handling funds under the 1917 Hospital Act must also be bonded, 1963 O.A.G. No. 51, p. 273, under Burns § 49-143.

The bank would not constitute a deputy or employee *per se* under Burns § 49-501, but it would constitute an agent for the treasurer. The latter cannot delegate responsibility when he delegates duties. *Qui facit per alium facit per se.* Responsibility remains where placed by the voters.

As an agent, however, the bank cannot escape the commands of Burns § 49-143. It must be bonded if it is to handle any

funds of that hospital. While the bank is neither a deputy nor employee, it is absorbing the functions of these categories of persons and acting in their behalf, thereby necessitating protection of the public by bond or surety. This could, of course, be done by endorsing this liability upon the public official's bond for the bank, its employees, and any of its correspondent banks which may perform part of the services to be performed under such a contract.

The local officials and their sureties would, therefore, be liable for error or misfeasance by the bank and its employees in handling the accounts. The public officials' obligations would not and could not be diminished.

The application of this agency principle would not constitute an impairment of the surety contract under Art. 1, § 24 of the Indiana Constitution. *Bolivar Township Bd. of Fin. v. Hawkins,* 207 Ind. 171, 191 N.E. 158, 96 A.L.R. 271 (1934).

VI.

The next question for consideration is whether the bank's official check written against a fund of the bank, which might include funds from other units, both governmental and private, conflicts with Public Depository Law, Burns §§ 61-622—633.

The Public Depository Law requires that public funds be deposited daily in banks selected as depositories in accordance with its provisions. Your letter advises that the bank being considered for use under Burns § 18-2016 is not a depository selected under the Public Depository Law for the hospital corporation concerned.

The Public Depository Law gives a broad inclusive definition of the term "public funds," Burns § 61-622(c). As a result of this broad definition, it has been determined that daily sums accumulated by a collection firm on accounts receivable assigned by the hospital trustees could not be deposited in the collection firm's bank account awaiting a monthly turnover to the hospital treasurer, as such a practice would violate the Public Depository Law. 1963 O.A.G. 314, No. 59.

Subsequent, however, to that Official Opinion, the Legislature enacted Burns IND. STAT. ANN., §§ 18-2016 and 18-2017.

Burns IND. STAT. ANN., § 18-2017(c), provides:

> "(c) The term 'bank or trust company,' or the plural thereof, means any national banking association formed under the laws of the United States with its principal office located in the state of Indiana and doing business herein, and any bank or trust company, any bank of discount and deposit, loan and trust and safe deposit company, or trust company organized and doing business under the provisions of any law of this state. The phrase 'bank or trust company' shall also include a bank service corporation having its principal office in the state of Indiana and organized as authorized by the laws of the United States or organized under and pursuant to the Acts of 1963, chapter 359."

That provision of the Act does not require the bank or trust company to be a depository selected under the Public Depository Act for the officers for whom it is acting. The Legislature has exempted deposits under Burns § 18-2016 from the Public Depository Act. This is fully within the power of the Legislature. *Storen v. Sexton,* 209 Ind. 589, 200 N.E. 251, 104 A.L.R. 1359 (1936).

VII.

Your inquiry also raises the question of whether checks drawn by the bank on its own funds under a contract entered into under Burns § 18-2016 are public records under Burns § 57-509, thus requiring that they be returned to the public official for whom the bank is agent and retained as public records.

Public records are defined in Burns § 57-509 as follows:

> "The term 'public records' as used in this act means any written or printed book or paper or document or map or drawing which is the property of any county or of any city, town, township, school corporation,

> library or other political subdivision thereof, and in or on which any entry has been made or is required to be made by law, or which any officer or employee of the state has received, or is required to receive for filing."

Two conditions are necessary to the creation of a public record under this statute; it must be the property of the governmental unit, and it must be one required to be kept by law. Both conditions are present here. As to the first, the bank is acting only on behalf of the public official and as his agent or employee. The checks, therefore, belong to the principal, and any such contract should so provide. As to the second, Burns § 60-202, previously quoted herein, obviously requires that such records shall be kept, as do individual provisions relating to each separate governmental unit which may desire to contract for services pursuant to the Bankers' Act.

Even in the absence of this statute, however, such checks would be public records. The Indiana Supreme Court in *Robison v. Fishback,* 175 Ind. 132, 93 N.E. 666 (1911), held that a card index system devised and installed by a county treasurer while in office, and patentable, became the property of the county despite the absence of any statutes requiring the keeping of such an index system or defining it as a public record. The cost of establishing the system had been paid with public funds. The court reasoned that creations by a public servant in the performance of his official duties to perform those duties more efficiently becomes the property of the public and not the personal property of the creator. The court said:

> ". . . This index is not required by any specific law, and it is wholly optional with treasurers whether they keep indexes to these records, but they are so far authorized that the public authorities might contract and pay for their making as conveniences for the use of the officers and the public, and if so procured, while they may not in the strict sense be public records, they are undoubtedly authorized to be made and kept. They are not less public by reason of being made by an officer in the course of his administration of the office.

> The public have a direct interest in them not only during the term of the incumbent of the office, but indefinitely." 175 Ind. at 136, 93 N.E. at 668.

The court went on to quote with approval the statement:

> "'. . . Whenever a written record of the transaction of a public officer in his office, is a convenient and an appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not to the officer; it is the property of the state and not of the person, and is in no sense a private memorandum.'" 175 Ind. at 137, 93 N.E. at 668, 669.

County officials are not required to utilize the provisions of Burns § 18-2016. When they do, however, they are not delegating responsibility but duties. The actions by the bank in performing the contract are essentially the super-ego of the local official whose functions they are performing. In substance, if not in form, the bank is acting as a local official in performing his duties. Its work product does not, therefore, become its personal property, but belongs to the public. For the purposes of this opinion, the checks issued by the bank, signed by it, and drawn on its fund belong to the public and the original must be turned over to the public official in his official capacity. Whether other documents, papers, and work product of the bank must be turned over to the local official is a matter not under consideration at this time, which is left to future determination on the specific facts of each situation.

CONCLUSION

Consideration has not been given to the wisdom or necessity of Burns §§ 18-2016 and 18-2017. Such considerations are for the Legislature. Consideration has only been given to the legal interpretation and application of the legislative enactments. We leave the balancing of public fiscal protection and more expedient and efficient operation of the state political units to that body.