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MAY 27 2009

OPINION COMMITTEE

May 22, 2009

Hon. Greg Abbott
Attorney General of Texas
Attention: Opinion Committee
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

FILE # ML-46069-09
I.D. # 46069

RQ-0850-GA

Re: Request for Opinion

Dear General Abbott:

On behalf of the Potter County Treasurer ("Treasurer") and the Potter County Auditor ("Auditor"), we request an opinion regarding the responsibilities of the county treasurer and the county auditor in certain transfers of funds.

BACKGROUND

The questions derive from the use of two procedures for managing county funds: transfers of funds from one account in a depository bank to another, and transfers of county funds from one investment to another.

Although Potter County ("the County") uses a single depository bank, there are multiple accounts in that bank for the various county funds. There are occasions when funds must be moved from one depository account to another, generally for budgetary reasons. These transfers are made electronically, as opposed to being made by written instrument such as a check or warrant. In these situations, the Auditor requires that such transfer be approved prior to the transfer being made, similar to the requirement that county warrants must be counter-signed by the county auditor. The Treasurer also provides documentation of the amount to be transferred in order that the Auditor has the information to verify the amount. There is some concern on the part of the Treasurer that this constitutes an unnecessary delay in the transfer of the funds and can cause extra work on the part of the Treasurer in providing the documentation.

The transfer of funds between investment accounts is governed by different authority. Potter County has adopted the *Potter County Investment Policy*, which, among other provisions, provides that the Investment Officer, who is the Treasurer, "may invest the [Potter] County funds that are not immediately required to pay obligations of Potter County." *Potter County Investment Policy*, Section I. The Policy sets out the parameters for these investments. The

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implementation of this Policy necessitates the occasional transfer of county funds from one investment account to another. For example, funds invested in TexPool might be transferred to an investment account in the county's depository bank. The discussion during the first issue raised the question of whether the Auditor may require prior approval of transfers of invested funds.

All parties agree that the Auditor has oversight of both types of transactions. The questions involve the authority of prior approval of the transfers.

QUESTIONS PRESENTED

- 1) May a county auditor require prior approval of a transfer of county funds from one account in the county depository to the other?
- 2) May a county auditor require prior approval of a transfer of county funds from one investment to another?

DISCUSSION

At the center of this question is the balancing of the responsibilities of the county treasurer and the county auditor. Both offices play a vital role in the management of county funds, which makes it essential that the role of each be respected. Nevertheless each officer has a distinct sphere of authority that other officer cannot contradict. County officials, like the county treasurer and county auditor possess "only those powers that the law expressly confers upon the position or that are necessarily implied therefrom." Op. Tex. Att'y Gen. No. M-955 (1971) (citing Op. Tex. Att'y Gen. No. M-756 (1970)). We have found it useful in this regard to review the duties of both positions.

The county treasurer is the chief custodian of county funds. Tex. Loc. Gov't Code § 113.001 (Vernon 2008). On receiving money belonging to the county, the treasurer will deposit that money into the county's depository bank. *Id.* As custodian, the county treasurer also disburses county funds, subject to the oversight of the county auditor, as discussed below. *Id.* at § 113.041(a). The county treasurer also plays a primary role in managing county investments. The commissioners court "may direct the county treasurer to withdraw any county funds deposited in a county depository that are not immediately required to pay obligations of the county and invest those funds" as authorized by law. *Id.* at § 116.112 (a). The investment authority of the county treasurer includes the authority to move funds from one investment option to another, and implies that the county treasurer has unbridled authority in this area subject to the direction of the commissioners court. Op. Tex. Att'y Gen. No. DM-96 (1992).

The county auditor "has general oversight of the books and records of a county . . . officer authorized or required by law to receive or collect money or other property that is intended for the use of the county or that belongs to the county." Tex. Loc. Gov't Code § 112.006 (a) (Vernon 2008). Although the county treasurer is charged with the responsibility of disbursing county funds, any "check or warrant" drawn on the county depository must be countersigned by the auditor. *Id.* at § 113.043.¹ This oversight authority extends not just over the functions of the

¹ As of this writing, a bill pending in the Texas Legislature would amend the language of § 113.043 to replace the word "warrant" with the word "order." 2009 Texas House Bill No. 3398, Texas Eighty-First Legislature. This proposed amendment is no doubt a nod to the growing use of electronic transfer rather than print documents in financial transactions.

treasurer, but over all county offices: prior approval by the auditor is required before any claim can be presented to the commissioners court for payment. *Id.* at § 113.064. If the method of transfer from one account to another is a check or warrant, Section 113.043 requires the county auditor's prior approval in the form of a counter signature. *Id.* at § 113.043 (a). Whether the auditor may impose such a regulation is irrelevant since the auditor has an affirmative duty to counter sign such a transfer.

Even without this specific authority, since county funds are involved, the auditor in this instance may "adopt and enforce regulations, not inconsistent with law . . . that the auditor considers necessary for the speedy and proper collecting, checking, and accounting of the revenues and other funds and fees that belong to the county." *Id.* at § 112.001 (emphasis added). A practical application of this statute was approved by your office in JM-1263 addressing the propriety of an auditor's procedure requiring the use of the county's employer identification number on all county depository accounts. Op. Tex. Att'y Gen. No. JM-1263 (1990). The controversy in JM-1263 arose from a disagreement between the county tax assessor-collector and the auditor over control of certain bank accounts. In the course of this controversy, the tax assessor-collector obtained a separate federal tax number for certain collection accounts. The auditor then imposed a rule requiring the county's federal tax number be used on all accounts in the county depository. The opinion approved this regulation but only to the extent that it applied to an account containing county funds. *Id.* See also Op. Tex. Att'y Gen. No. DM-396 (1996).

Since all the funds affected by this opinion are county funds, the auditor's procedure appears to be valid provided that the procedure is "not inconsistent with law."² We are not aware of other law prohibiting the auditor's procedure. Nor are we aware that in the case of transfers within the county's depository this procedure interferes with the treasurer's duties as custodian of the funds. On the contrary, the auditor has authority over the accounts in the county depository by virtue of her authority over the county general fund. Upon the adoption of the county's budget, it is the auditor's responsibility to "open an appropriation account for each main budgeted or special item in the budget." Tex. Loc. Gov't Code § 111.091 (a) (Vernon 2008). The county auditor then "oversees the warrant process to ensure that the expenses of any department do not exceed the budget appropriations for that department." *Id.* at § 111.092. Given these responsibilities, the auditor is within her discretion to require approval of fund transfers.

Transfers between investments funds are governed by different authority. We again emphasize that no one questions the authority of the auditor to assure the accuracy of county investments, which is founded in section 112.001. As JM-1263 notes, however, the authority to audit is broader than the authority to establish procedures. Op. Tex. Att'y Gen. No. JM-1263 (1990) at 3. A regulation could interfere with the duties of the treasurer. An attorney general opinion from 1957 illustrates the point. In that instance, an auditor required that the county's bank statement and cancelled checks be delivered directly from the depository bank to the auditor's office. Op. Tex. Att'y Gen. No. WW-154 (1957) at 2. While the auditor had the authority to review such documents, the treasurer was the official exercising the duty of custodian of the deposits, and therefore was entitled to retain possession of the documents. *Id.* To hold

² The other limitation of section 112.001 invokes section 112.003, Local Government Code, which is not relevant to the issues at hand.

otherwise crosses the line from monitoring to interference with the treasurer's role as custodian of county funds. *Id.*

A similar situation exists under these facts. The treasurer is directed by the commissioners court to invest county funds. Tex. Loc. Gov't Code § 116.112(a) (Vernon 2008); Op. Tex. Att'y Gen. No. DM-96 (1992). Decisions about the timing of such investment are necessarily within the discretion of the county treasurer, and consequently to require the approval of another officer before the transfer is made is to interfere with the treasurer's responsibility as investment officer.

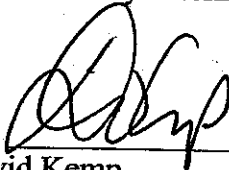
CONCLUSION

The county auditor may adopt a procedure requiring her approval by way of countersignature of transfers of county funds between depository accounts. However, transfers of county funds from one investment to another are within the discretion of the county treasurer as investment officer although the auditor has the authority to audit such accounts.

We look forward to your opinion.

Sincerely,

SCOTT BRUMLEY
Potter County Attorney

By: 
David Kemp
First Assistant County Attorney
Civil Division

c: Ms. Leann Jennings, Potter County Treasurer
Ms. Kerry Hood, Potter County Auditor