

August 6, 1954.

HON. ARCHIBALD S. ALEXANDER
State Treasurer of New Jersey
 State House
 Trenton 7, New Jersey

FORMAL OPINION 1954—No. 16

DEAR MR. ALEXANDER:

In connection with the various funds established by law within the Division of Employment Security, Department of Labor and Industry, State of New Jersey, you have submitted a series of questions, which may be summarized thusly:

- a) Who has the responsibility of determining anticipated cash requirements and the amount to be invested?
- b) Who has the responsibility for the selection of depositories, the making of deposits, and the execution of custody agreements?
- c) In connection with any investments that may be proposed after the determination mentioned in a) above is made, what is the procedure with respect to the making of such investments?

ORGANIZATIONAL BACKGROUND

The present Division of Employment Security finds its origin in the former Unemployment Compensation Commission established by Chapter 270, P. L. 1936 (R. S. 43:21—10). As part of the reorganization of our State Government in 1948, and the establishment of a Department of Labor and Industry as a principal department in the Executive branch of our State government, (N. J. S. A. 34:1A—1 et seq.), the Unemployment Compensation Commission and the office of its executive director were abolished (R. S. 34:1A—31) and the functions, powers and duties of the Unemployment Compensation Commission and its bureaus and divisions and of the executive director thereof, were assigned to and were to "be exercised and performed through, the Division of Employment Security of the Department of Labor and Industry * * *" (N. J. S. A. 34:1—14; see also N. J. S. A. 34:1A—21). As a part of the same reorganization statute, the Division of Employment Security was placed under the "immediate supervision" of a director charged to "administer the work of such division under the direction and supervision of the commissioner (of Labor and Industry)", the director to also "perform such other functions of the department as the commissioner may prescribe." (N. J. S. A. 34:1A—15)

The 1948 Act also established within the Division of Employment Security, an Employment Security Council, consisting of seven persons to be appointed by the Governor, with the advice and consent of the Senate; the seven members of the Unemployment Compensation Commission in office on the effective date of the 1948 act being constituted the first members of the Employment Security Council for the remainder of their respective terms (N.J.S.A. 34:1A-16). The Employment Security Council was directed, among other things, to consult and advise with the Commissioner of Labor and Industry and the Director of the Division of Employment Security with respect to the administration and operation of the Unemployment Compensation Law (N.J.S.A. 34:1A-17).

The Act provided in R.S. 34:1A-32 that:

"Whenever the term 'Unemployment Compensation Commission' occurs or any reference is made thereto in any law, contract, or document, the same shall be deemed to mean or refer to the Commissioner of Labor and Industry

designated as the head of the Department of Labor and Industry established hereunder.”
and that:

“Whenever the term ‘Executive Director of the Unemployment Compensation Commission’ occurs or any reference is made thereto in any law, contract, or document, the same shall be deemed to mean or refer to the director of the Division of Employment Security established hereunder.”

R.S. 43:21-11, which defined the powers and duties of the former Unemployment Compensation Commission, was amended in 1952 to define the powers and duties of the Division of Employment Security. An examination of this section discloses that the Division is granted, as was the former Unemployment Compensation Commission, considerable autonomous powers and duties, among which are the duty “to determine all matters of policy,” power to “determine its own organization and methods of procedure,” power to have “an official seal which shall be judicially noticed,” duty to submit an annual report directly to the Governor and power to appoint, fix the compensation and prescribe the duties and powers of its personnel, subject to civil service requirements.

Despite the broad language of R.S. 43:21-11, as amended, in 1952, it is our opinion that it does not disclose a legislative intention that the Division of Employment Security is to be an autonomous agency of the State Government. N.J.S.A. 34:1A-14 provided that the functions, powers and duties of the former Unemployment Compensation Commission were to be assigned to, and to be exercised and performed through, the Division of Employment Security and N.J.S.A. 34:1A-15 provided that the work of the Division was to be administered by the Director “under the direction and supervision of the commissioner [of labor and industry].” In view of these provisions, it is clear that the Legislature intended that the powers and duties conferred upon the Division of Employment Security, pursuant to R.S. 43:21-11, as amended, were to be exercised under the general and overall direction and supervision of the Commissioner of Labor and Industry and that the Division of Employment Security was to be a part, in every sense of the word, of the Department of Labor and Industry. The provisions of N.J.S.A. 34:1A:-3 placing the responsibility on the Commissioner of Labor and Industry for the work of the various divisions of his department, implement this conclusion.

The general duties and powers of the State Treasurer with respect to the deposit of public moneys coming into his hands is set out in R.S. 52:18-17 and R.S. 52:18-18 as follows:

R.S. 52:18-17.

“The state treasurer shall, except as otherwise provided, deposit to his credit as treasurer, all public moneys coming into his hands, within three days after receiving the same, in such of the national banks located in this state, and institutions authorized by this state to carry on a banking business, as he may select, that will allow interest not exceeding two per cent per annum on all balances. All interest so earned shall be credited to the state. Before making any such deposit of public moneys the state treasurer may require from any such institution a deposit of bonds of the United States or bonds of the state of New Jersey designed to secure any deposit made pursuant to the provisions of this section.”

R.S. 52:18-18, as amended.

“The State Treasurer may, when in his judgment it is not compatible with public safety to deposit the public moneys, or portion thereof, upon interest bearing terms, as provided by section 52:18-17 of this Title, deposit the same without interest or open time accounts with interest subject to

withdrawal upon thirty days' notice, in such of the national banks located in this State and institutions authorized by this State to carry on a banking business as he may select, until such a condition has, in his judgment, ceased to exist. In all cases where a deposit is made, pursuant to this section, the State Treasurer may require from any such institution a deposit of bonds of the United States, or bonds of the State of New Jersey, designed to secure any deposit made pursuant to this section; provided, that such requirement shall be deemed to be met if the Federal Reserve Bank of New York or the Federal Reserve Bank of Philadelphia certifies to the State Treasurer that, pursuant to authority given by the depositary, it holds bonds, owned by the depositary, of the kind and in the amount required by the State Treasurer to secure any such deposit."

Further, it should be noted that N.J.S. 52:18A-18 provides for the deposit of State revenue "to the credit of the State of New Jersey in such depositories as the State Treasurer shall designate."

THE FUNDS INVOLVED

The Division of Employment Security is concerned with the following separate funds established by statute:

- a) The Unemployment Compensation Fund
(R.S. 43:21-9)
- b) The State Disability Benefits Fund
(R.S. 43:21-46, as amended)
- c) The Unemployment Compensation Administration Fund
(R.S. 43:21-13)
- d) The Unemployment Compensation Auxiliary Fund
(R.S. 43:21-14 (g) as amended)

We now proceed to consider each of the above four funds in light of your several questions:

THE UNEMPLOYMENT COMPENSATION FUND

(a) The "Unemployment Compensation Fund" was established, pursuant to the provisions of R.S. 43:21-9, "as a special fund separate and apart from all public moneys or funds of this State." It consists of all contributions collected for unemployment compensation, interest earned thereon, any property or securities acquired through the use of moneys belonging to the fund, and all earnings of such property or securities.

R.S. 43:21-9(a) provides that this fund "shall be administered by the commission" [Unemployment Compensation Commission—now the Division of Employment Security].

R.S. 43:21-9(b) provides:

"Accounts and deposit. The treasurer of the State of New Jersey shall be ex officio the treasurer and custodian of the fund and shall administer such fund in accordance with the directions of the commission and shall issue his warrants upon it in accordance with such regulations as the commission shall prescribe. He shall maintain within the fund three separate accounts:

(1) A clearing account, (2) an unemployment trust fund account, and (3) a benefit account. All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer, who shall immediately deposit them in the clearing account. Refunds payable pursuant to subsection (f) of section 43:21-14 of this Title may be paid from the clearing account upon warrants issued by the treasurer under the direction of the commission.

After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the Secretary of the Treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section nine hundred four of the social security act, as amended, any provision of law in this State relating to the deposit, administration, release or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. *Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund.* The treasurer shall give a separate bond conditioned upon the faithful performance of his duties as custodian of the fund in an amount fixed by the commission and in a form prescribed by law or approved by the Attorney-General. Premiums for said bond shall be paid from the administration fund." (*Underlining ours.*)

And R.S. 43:21-9(c) provides in part as follows:

"Withdrawals. Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits in accordance with regulations prescribed by the commission. The commission shall from time to time requisition from the unemployment trust fund such amounts, not exceeding the amounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall issue his warrants for the payment of benefits solely from such benefit account. *** All warrants issued by the treasurer for the payment of benefits and refunds shall bear the signature of the treasurer and the counter-signature of the executive director or his duly authorized agent for that purpose.*** "

It is our opinion that the function of administering the Unemployment Compensation Fund has been transferred to the Division of Employment Security pursuant to the provisions of N.J.S.A. 34:1A-14; that the Division of Employment Security has the responsibility for administering this fund to effectuate the purposes of the unemployment compensation act and that the State Treasurer, in carrying out his functions as treasurer and custodian, is subject to directions of the Division of Employment Security to the extent necessary to enable the Division of Employment Security to carry out its responsibilities for such administration.

As part of its duties with respect to the Unemployment Compensation Fund, the Division of Employment Security must necessarily determine from time to time its anticipated needs for cash requirements. Such determination must inevitably be made upon the basis of past experience and a prognosis of future eventualities. Accordingly, it is our opinion that the determination of anticipated cash requirements and the amount, if any, to be invested is one to be made by the Division of Employment Security under the direction and supervision of the Commissioner of Labor and Industry.

(b) The next questions relate to the responsibility for the selection of depositories, the making of deposits and the execution of custody agreements, in connection with the Unemployment Compensation Fund.

As has been noted hereinbefore, the Unemployment Compensation Fund is separated into three separate accounts, a clearing account, an unemployment trust fund

account, and a benefit account. We are herein only interested in the first and third accounts because the second account, namely, the unemployment trust fund account, is maintained with the Secretary of the Treasury of the United States.

Under R.S. 43:21-9(b), quoted above, the State Treasurer, by virtue of his office, is treasurer and *custodian* of the Unemployment Compensation Fund, including the moneys of the clearing and benefit accounts.

As custodian, it is the treasurer's duty to "watch, guard and account for that which is committed to his custody" (25 C.J.S. 69, 70; *Bank of Commerce v. Hartford Accident and Indemnity Co.* 164 F. (2d) 149; C.C.A. 5th, 1947). To insure the faithful performance of such duty, the State Treasurer is required, by the last two sentences of R.S. 43:21-9(b), to give a separate bond.

In view of the duties thus imposed on the State Treasurer as custodian of the moneys of the fund so delivered to him, it is, in our opinion, his responsibility and duty to determine in what depositories he shall deposit and keep the moneys which he must "watch, guard and account for."

The language in R.S. 43:21-9(b) providing that the State Treasurer "shall administer such fund in accordance with the directions of the commission" and that "moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the commission, in any bank or public depository in which general funds of the State may be deposited" is not inconsistent with this conclusion. The Division of Employment Security, as the successor to the Unemployment Compensation Commission, performs its statutory function with respect to the administration of the unemployment compensation fund when it determines how much cash it will require for its immediate future operations and disburses these moneys in accordance with the statute. The State Treasurer, as treasurer and custodian of the fund, is subject to the directions of the Division with respect to how much moneys may be deposited by him in banks.

But the duty of selecting the banks in which such moneys should be deposited is one to be performed by the one whom the statute makes the bonded custodian of the moneys, the State Treasurer, who, as we have hereinbefore indicated, is, by R.S. 52:1-17 and R.S. 52:18-18, as amended, given the general power, and, is required, in the absence of express statutory provisions to the contrary, to deposit all public moneys coming into his hands in banks located in this state which he may select subject to the conditions of R.S. 52:18-17 and 18, as amended.

Chapter 22, P.L. 1954 (N.J.S.A. 52:18A-8.1 to 8.3) authorizes the State Treasurer to enter into custody agreements with reference to funds, securities or other assets of the State or of any pension agency, fund or system maintained in whole or in part by the State.

We consider that the making of these custody agreements represent an authorized delegation by the State Treasurer of some of his administrative functions.

Because the State Treasurer is the only state official or agency statutorily empowered to enter into custody agreements, it is our opinion that any such agreements to be made with respect to the unemployment compensation fund are to be made by the State Treasurer, in accordance with the provisions of the custody agreement statute aforementioned.

(c) As to any investments that may be proposed to be made with respect to any moneys of this fund, — N.J.S.A. 52:18A-86 provides that the functions, powers and duties of, or relating to, investment or reinvestment of moneys of and purchase, sale or exchange of any investments or securities pursuant to the provisions of Chapter 148, P.L. 1944 (R.S. 52:18-25.1), are transferred to and shall be exercised and performed by the Director of the Division of Investment, Department of the Treasury, subject to the written acceptance or rejection by the State Treasurer of

any proposed investment or reinvestment, purchase, sale or exchange. Chapter 148, P.L. 1944, above referred to, applies to moneys of the State held by the State Treasurer "under a requirement that said moneys be held for a particular time or be held for a particular use." It is our opinion that moneys of the Unemployment Compensation Fund are held in the custody of the Treasurer "for a particular time" or "for a particular use" and that therefore any portion of the benefit account declared to be available for investment by the Director of the Division of Employment Security, may be invested in accordance with the provisions of N.J.S.A. 52:18A-86 as aforementioned.

THE STATE DISABILITY BENEFITS FUND

(a) The State Disability Benefits Fund was recently the subject of consideration by this Office in our Formal Opinion 1954—No. 13, dated June 22, 1954, to which reference is hereby made.

As we stated in that opinion, this fund was established by the provisions of R. S. 43:21—46, as amended, comprising worker and employer contributions made pursuant to the provisions of our subsections (d) and (e) of R. S. 43:21—7, less refunds, plus interest and earnings from investments of the Fund, and assessments, fines and penalties collected under the act. The fund is held in trust for the payment of disability benefits and for authorized refunds. The statute provides that "The fund shall remain in the custody of the State Treasurer and to the extent of its cash requirements shall be deposited in authorized public depositories in the State of New Jersey."

Likewise, as was pointed out in our June 22, 1954 opinion, the responsibility for determining the anticipated cash requirements of this fund, and the amount to be invested is that of the Division of Employment Security, acting through its Director, subject, of course, as has heretofore been indicated, to the overall general supervision of the Commissioner of Labor and Industry.

(b) R. S. 43:21—46 (a), as amended, provides in part:

"The fund shall remain in the custody of the State Treasurer, and to the extent of its cash requirements shall be deposited in authorized public depositories in the State of New Jersey * * * All moneys withdrawn from the fund shall be upon warrant signed by the State Treasurer and countersigned by the Director of the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey. The Treasurer shall maintain books, records and accounts for the fund, appoint personnel and fix their compensation within the limits of available appropriations. The expenses of the Treasurer in administering the fund and its accounts shall be charged against the administration account, as hereinafter established."

It is our opinion that the State Treasurer, who is made custodian of the State Disability Benefits Fund, and in whose custody that fund is to remain, has the responsibility of selecting the depositories in which the moneys of the fund are to be deposited.

As to custody agreements—the execution of such agreements are the responsibility of the State Treasurer, this for the same reasons set forth in the discussion of the matter as it relates to the Unemployment Compensation Fund.

(c) Formal Opinion No. 13 of June 22, 1954 sets forth the responsibilities and procedures for the handling of investments of moneys of this fund in excess of cash requirements.

THE UNEMPLOYMENT COMPENSATION ADMINISTRATION FUND

This fund was created by R. S. 43:21—13 which provides in part as follows:

"There is hereby created in the State treasury a special fund to be known

as the unemployment compensation administration fund. All moneys which are deposited or paid into this fund are hereby appropriated and made available to the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey. All moneys in this fund shall be expended solely for the purpose of defraying the cost of the administration of this chapter (R. S. 43:21—1 et seq.), and for no other purpose whatsoever."

The fund consists of monies appropriated by the State, and moneys received from the United States of America and various agencies thereof for purposes of defraying the cost of administering the Unemployment Compensation Law.

R. S. 43:21—13 further provides:

"All moneys in this fund shall be deposited, administered, and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury. Any balances in this fund shall not lapse at any time, but shall be continuously available to the Division of Employment Security of the Department of Labor and Industry of the State of New Jersey for expenditure consistent with this chapter (R. S. 43:21—1 et seq.). The State Treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation administration fund . . ."

(a) In our opinion, the statutory provisions governing this fund places the responsibility for determinations as to the cash requirement of this fund and whether any moneys are available for investment with the Division of Employment Security.

(b) The statute (R. S. 43:21—13) provides that moneys in the fund, "a special fund in the State Treasury", "shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State Treasury." In our opinion, the provisions of R.S.52:18—17 and R. S. 52:18—18, as amended, control and empower the State Treasurer to exercise the function of selection of depositories for moneys of the fund.

For the same reasons as set forth in our discussion above concerning the unemployment compensation fund, it is our opinion that the execution of custody agreements, if any, relating to moneys in this fund is the sole responsibility and function of the State Treasurer.

Detailed discussion of the investment responsibilities and procedures incident to this fund appear most academic and therefore unnecessary in view of the fact that this fund represents active working capital, and must be "continuously available" to the Division of Employment Security. *Should*, however, a policy determination be made that surplus of moneys of the fund should be invested, perhaps for a short period, then the procedure set forth in N. J. S. A. 52:18A—86 relating to the investment of funds held by the State Treasurer "for a particular time", or for a "particular use" would apply—namely, such moneys would be invested by the Director of the Division of Investment, subject to the acceptance or rejection of any proposed investment by the State Treasurer, under the procedures set forth in N. J. S. A. 52:18A—86. of which you are aware.

THE UNEMPLOYMENT COMPENSATION AUXILIARY FUND

The Unemployment Compensation Auxiliary Fund was established by R. S. 43:21—14 (g), as amended, and consists of all interest and penalties collected pursuant to R. S. 43:21—14, as amended. The statute cited further provides that:

" . . . all moneys in this special fund shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be expended, under legislative appropriation, solely for the pur-

pose of aiding in defraying the cost of the administration of this chapter and for essential and necessary expenditures in connection herewith not provided in or by grants of the Federal Government. The Treasurer of the State shall be ex-officio the treasurer and custodian of this special fund and, subject to legislative appropriation, shall administer the fund in accordance with the directions of the division. Any balances in this fund shall not lapse at any time, but shall be continuously available, subject to legislative appropriation, to the division for expenditure. The State Treasurer shall give a separate and additional bond conditioned upon the faithful performance of his duties in connection with the unemployment compensation auxiliary fund . . .”.

(a) This fund is not available for expenditure by the Division of Employment Security unless the Legislature first makes an appropriation therefrom for that purpose. In effect, therefore, it is the Legislature which must determine anticipated cash requirements and amount of moneys to be expended out of the fund. The unappropriated balance of the fund remains a special fund in the State Treasury available for investment except for a reasonable reserve to cover possible claims for refund of penalties and interest collected. The amount to be reserved for that purpose is to be determined by the Division of Employment Security through its Director.

(b) As to the selection of depositories—in our opinion, this is the function of the State Treasurer under the provisions of R. S. 52:18—17 and R. S. 52:18—18, as amended, hereinabove discussed. For the same reasons as set forth in our discussion concerning the Unemployment Compensation Fund, it is our opinion that the execution of custody agreements, if any, relating to moneys and properties in this fund, is the sole responsibility and function of the State Treasurer.

(c) It is our opinion that the moneys of the Unemployment Compensation Auxiliary Fund are held in the custody of the State Treasurer “under a requirement that said moneys be held for a particular time or be held for a particular use” within the meaning of Ch. 148, P. L. 1944 above discussed, and that, therefore, any investment of those moneys is to be made by the Director of the Division of Investment, subject to the acceptance or rejection of any proposed investment by the State Treasurer under the procedure set forth in N. J. S. A. 52:18A—86.

Very truly yours,

GROVER C. RICHMAN, JR.
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