

Opinion No. 17

**Examinations—Examination Fees—Collections—State Treasurer,
Duties—State Examiner, Duties**

Held: It is the duty of the state examiner to collect the examination fees required to be paid by counties, towns, schools, banks, investment and trust companies and building and loan associations under the provisions of Chapter 9, Title 5, Revised Codes of Montana, 1947.

June 19, 1957

Mr. R. E. Towle
Superintendent of Banks
Department of Banking
Capitol Building
Helena, Montana

Dear Mr. Towle:

You have asked whether it is the duty of the state treasurer or the state examiner to collect the examination fees required to be paid by counties, towns, schools, banks, investment and trust companies and building and loan associations under the provisions of Chapter 9, Title 5, Revised Codes of Montana, 1947.

This chapter derives from the so called "bank act" of 1927, Section 73, Chapter 89, of the Laws of 1927, as amended.

The act provides all moneys collected shall be paid to the state treasurer. Those sections of the chapter dealing with routine examinations are silent as to the collecting agency. However, the code section dealing with special examinations and setting special examination fees (5-910) provides:

" . . . All special examination fees or charges so collected by the state examiner and ex officio superintendent of banks and paid to the state treasurer, shall be placed in a special fund to be known as the special examination fund to be drawn upon by the state examiner and ex officio superintendent of banks to defray the actual costs and expenses of such special examinations, but all moneys remaining in such special fund at the end of each current year shall be transferred by the state treasurer to the general fund."

This sentence was in the original act, and, so far as the function of the examiner is concerned, survived four amendments. It is not contradicted by any of the other provisions of the act as originally written or amended. In the original act it is found in the same section with all other matters pertaining to examination fees. In the

absence of any other reference to collections, it must be concluded the legislature intended this provision to apply to all parts of the section.

This clear indication of the legislative intent is supported by the fact that in Section 5-909 of the code (which was a part of the original act) the legislature specifically directed the examiner to collect for his own expenses incurred in the examination of building and loan associations:

“. . . Provided further, that all building and loan associations incorporated under the laws of other states, and doing business in the state of Montana under the supervision of the superintendent of banks, in addition to the regular fee as above set forth, shall pay to the examiners making such examination, their necessary traveling expenses including transportation and subsistence.”

The command of the legislature must be followed unless there is superceding law to the contrary, or it is contravened by some constitutional provision.

There is no contradictory provision in either the constitution or the laws of this state as they apply to the examiner. This leaves the question of whether the treasurer is charged by either constitution or statute with the duty of collecting these fees.

Two constitutional provisions apply to the duty of the treasurer:

“The state treasurer shall keep a separate account of each fund in his hands, and shall at the end of each quarter of the fiscal year report to the governor in writing, under oath, the amount of all moneys in his hands to the credit of every such fund, and the place or places where the same is kept or deposited, and the number and amount of every warrant paid or redeemed by him during the quarter . . . The legislative assembly may provide by law further regulations for the safe keeping and management of the public funds in the hands of the treasurer; but notwithstanding any such regulations, the treasurer and his sureties shall in all cases be held responsible therefor.” (Art. XII, Sec. 13).

This provision deals exclusively with the treasurer's duty as custodian and disburser of government funds.

Art. VII, Sec. 1, of the Montana Constitution places the treasurer in the executive department and directs that he perform his duties according to the constitution and laws of the state.

The treasurer's duties are not otherwise referred to in the constitution.

Section 79-201 of the code lays down the general duties of the treasurer.

The first enumerated duty is to "receive and keep all moneys belonging to the state. . ."

The sixth enumerated duty is to "keep an account of all moneys received and disbursed."

The last enumerated duty is to "discharge such other duties as may be imposed upon him by law."

It will be noted from the first and sixth duties cited above that the depository and disbursing functions of the treasurer are clearly established. None of the duties listed in this section include that of collection. Nor, in regard to the last duty cited above, am I able to discover any statutory provision obliging the state treasurer to make collections.

Section 79-306 of the code makes the Treasurer the depository agent for all state agencies, but no collection duties are created. In fact it provides for the disposition of all moneys received by all the state agencies. Certainly it could not have been the intent of the legislature that the state treasurer would collect for the state agencies, turn the money over to them, then accept it for deposit and disposition according to this section.

As there is no statute or constitutional provision specifically imposing collection duties on the treasurer, the question arises as to whether such duties might be implied from the nature of the office itself, that is to say, whether making collections is within the ordinary and traditional duties of the office.

The Montana Supreme Court has defined the treasurer as "one who receives public moneys, keeps them in his charge, and disburses them upon proper orders," (*Mutual Life Insurance Co. of New York v. Martien*, 27 Mont. 437, 71 P. 470). Thus the treasurer has three functions, according to the court: receiving money, keeping it and disbursing it.

More succinctly stated, but to the same effect, is the definition of the North Carolina Supreme Court: "A 'treasurer' is one in charge of a treasury and a 'treasury' is the place where public funds are deposited, kept and disbursed" (*Gardiner v. Board of Trustees of North Carolina Local Governmental Employment Retirement System*, 226 N.C. 465, 38 S. E. 2nd 314).

"The treasurer is an administrative officer and has by law the custody and control of the moneys of the state" (81 C.J.S. States, Sec. 65).

Law dictionaries uniformly limit their definition to the duties of a treasurer to those of custodian and disbursing officer.

I conclude from these and other authorities that it is not the ordinary, traditional and generally accepted duty of the state treasurer to make collections, but only to receive money collected by whatever

agency, make provision for its safe keeping and disburse it on proper authority.

In my opinion, therefore, whatever the practice has been in the past, it is not now and never has been the duty of the state treasurer under the state constitution or laws, or by general custom and usage, to collect fees owed any state agency, and that it is clearly the duty of the state examiner to bill for and collect fees due under Chapter 9, Title 5 of the 1947 Revised Codes of Montana.

Very truly yours,
FORREST H. ANDERSON
Attorney General