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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

March 28, 1974

Opinion No. 74- 104

Honorable Tom R. Van Sickle
State Treasurer
State Capitol
Topeka, Kansas 66612

ATT: Donald E. DeShazer

Dear Mr. Van Sickle:

K.S.A. 75-4218 states in pertinent part thus:

> "(a) All state bank accounts shall be secured by pledge of securities as provided in this section.
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> * * *
>
> "(d) Securities deposited to comply with this section may be withdrawn on application of the bank depositing the same, if such application is approved by the treasurer or his duly authorized deputy and the director of accounts and reports or his duly authorized assistant for the reason that such deposit of securities is no longer needed to comply with this section or are required for collection by virtue of their maturity or for exchange. <u>Securities withdrawn for collection by virtue of their maturity or for exchange shall be replaced within ten (10) days, but until replaced the state shall retain a first lien on the withdrawn security or the proceeds therefrom.</u>" [Emphasis supplied.]

Under subsection (e), active accounts, time deposit, open accounts, inactive accounts and custodial accounts must be secured "in an amount equal to seventy percent (70%) thereof . . . ."

You advise that it is the view of the auditor for the Board of Treasury Examiners that when securities are withdrawn because of maturity or for exchange, and are not replaced within ten days, that at the end of ten days after withdrawal, the statutory lien expires and the accounts involved are no longer fully secured.

The statute is designed to assure continued security for accounts secured by securities pledged by the bank holding the deposit, notwithstanding custody of the pledged securities may be remanded back to the bank upon withdrawal of maturing or exchanged securities. At 51 Am.Jur.2d Liens, § 38, the writer states that "a lien statute that is regarded as remedial is so construed as to give full force and effect to the remedy, in view of the beneficial purposes contemplated."

The Legislature has recognized that securities needed to secure large amounts of state bank accounts may from time to time mature, and be withdrawn for payment or for exchange for other securities, for any number of reasons. A period of ten days after withdrawal is granted to the pledgor bank to submit additional securities in lieu of those withdrawn, for the statute provided that "[s]ecurities withdrawn for collection by virtue of their maturity or for exchange shall be replaced within ten (10) days . . . ." The Legislature has added a further precaution that "until replaced the state shall retain a first lien on the withdrawn security or the proceeds therefrom."

This statutory lien was provided for obvious protective reasons. The construction put upon the language of this provision by the auditor would place the intended protection sought to be afforded the state at the mercy of the pledging bank. Under such a restrictive construction, the state would lose the security of the statutory lien precisely by the failure of the bank to comply with the statutory direction to restore securities in lieu of those withdrawn within ten days after withdrawal, precisely at that time when the state would reasonably value more highly the protection and security afforded by a statutory lien.

The use of the word "but" between the language directing replacement within ten days after withdrawal, and that providing for a first lien in favor in the state is significant, and controlling. The conjunction "but" is most commonly regarded as meaning "except," "on the other hand," "on the contrary," or "except that." See 5a Words and Phrases, pp. 769 et seq. Thus, although securities equal in value to those withdrawn are required by the first clause of the sentence to be replaced within ten days, the second clause directs that notwithstanding prompt replacement, the state enjoys a first lien on those withdrawn securities, which must be deemed to continue until replacement occurs, at whatever time, and not merely subject to termination at the end of ten days after withdrawal by virtue of the pledging bank's own inaction, or due to circumstances beyond the control of either the state or the pledging bank in the transfer of securities. The protection sought to be afforded by the state by this provision is not so fragile. Such a restrictive construction would not serve the obvious remedial purpose the lien is intended to serve, and would be contrary to the express language of the statute. It takes no significantly liberal construction of the statutory language to construe the statute as stated above, to regard the "but," as a disjunctive conjunction, providing for continuance of the protective lien without regard to timely or untimely replacement mandated by the initial clause of the sentence.

Accordingly, it is our opinion that the first lien afforded by the statute upon withdrawn securities does not expire ten days after withdrawal, replacement or no, but continues thereafter and until replacement occurs.

Yours very truly,

Vern Miller

VERN MILLER
Attorney General

VM:JRM:jsm

cc: Lyell D. Ocobock
Office of State Auditor

Henry Schwaller
Secretary of Administration

Carl O'Leary
State Bank Commissioner