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1. BOND OF PROSECUTING ATTORNEY — COMPLIANCE WITH SECTION 2911 G. C., EVEN THOUGH IT BE IN AN AMOUNT EQUAL TO OR IN EXCESS OF HIS ANNUAL SALARY IS NOT SUFFICIENT COMPLIANCE WITH SECTION 3004 G. C.

2. TO BE ENTITLED TO DRAW ON AN APPROPRIATION PURSUANT TO SECTION 3004 G. C., PROSECUTING ATTORNEY MUST GIVE SEPARATE BOND IN AN AMOUNT NOT LESS THAN THE AMOUNT OF HIS OFFICIAL SALARY.

SYLLABUS:

Compliance with Section 2911 General Code, as to the bond of the prosecuting attorney even though it be in an amount equal to or in excess of his annual salary, is not a sufficient compliance with Section 3004 General Code, and the prosecuting attorney in order to be entitled to draw on an appropriation made pursuant to such Section 3004 must give a separate bond in an amount not less than the amount of his official salary.

Columbus, Ohio December 28, 1944

Hon. Rodney R. Blake, Prosecuting Attorney
Sidney, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"In a report of examination of the officers and boards of Shelby County, Ohio, filed April 22, 1944, the State Examiner indicated that it was the duty of the prosecuting Attorney to file two bonds, one pursuant to the provisions of Section 2911 G. C. and the other under Section 3004 of the General Code of Ohio.

We have taken the matter up with our Common Pleas Judge, and he is in accord with the 1932 Attorney General's opinion No. 4863, which indicates that only one bond is necessary in a sum not less than the official salary.

When our bond was set in 1940 for the first term, we discussed the matter and gave one bond in the amount of \$2,000.00 which is greater than our official salary.

We would appreciate an informal opinion as to whether or not we are required to give two separate bonds, one under each of said sections."

The question which you raise has been before this department at least three times. In an opinion found in 1915 Opinions, Attorney General, p. 785, the then Attorney General, Mr. Turner, held:

"Before the prosecuting attorney of a county is entitled to a warrant from the county auditor for an expense allowance of an amount not to exceed one-half of his official salary, as authorized by the provision of section 3004, G. C., he must give the bond required by said section in addition to the official bond given by him as required by the provision of section 2911, G. C."

In that opinion, while it was admitted that the conditions of the bond required by Section 2911 and those required by Section 3004 of the General Code were the same, yet emphasis was placed upon the fact that the minimum amounts specified in the two statutes were not the same and it was stated that the primary purpose of requiring the bond under Section 3004 General Code is to hold said officer accountable for the proper use of the allowance made to him under authority of that section. In 1928, the question was again presented to the Attorney General, who referred to his former opinion and expressed his accord with the reasoning and conclusion thereof. (See 1928 Opinions, Attorney General, p. 291).

In 1932 the same question was presented to Attorney General Bettman who in an opinion found in 1932 Opinions, Attorney General, p. 1469 held:

“When the prosecuting attorney, before undertaking the duties of his office, has given bond to the State of Ohio in a sum as fixed by the Common Pleas Court or the Probate Court, in excess of the amount of his official salary, with sureties approved by such court, conditioned that he will faithfully perform the duties enjoined upon him by law and pay over, according to law, all moneys by him received in his official capacity, it is not necessary for such prosecutor to file an additional bond in order to be entitled to the additional allowance provided in Section 3004, General Code.”

In this opinion no reference whatever was made to the former rulings of the department, but the Attorney General proceeded with an analysis of Sections 2911 and 3004 of the General Code, and pointed out that the conditions of the bond required to be given by each of these sections are identical, and said:

“An examination of each of such sections discloses no difference in the purpose of the bond mentioned in Sections 2911 and 3004, General Code. There is a difference in the time at which the bonds mentioned are required to be filed. Thus, the prosecuting attorney may not assume the duties of his office until he shall have given a bond in the penal sum as determined by the provisions of Section 2911, General Code, and he may not disburse or receive the additional allowance until a bond has been filed which complies with the provisions of Section 3004, General Code. Such examination does not disclose any specific provision which would prevent the prosecuting attorney from receiving or disbursing the additional allowance fund, if the court, in fixing

the penal sum of the bond to be filed by the county prosecutor when taking office, fixed such bond in a penal sum equal to or greater than the salary of the prosecuting attorney, unless such sections require separate and distinct bonds.

I find no language in either of such sections, stating specifically that the bonds are cumulative. The language of Section 3004 supra, would indicate that its provisions would be complied with if the penal sum of the bond filed by the prosecutor prior to his assumption of the duties of his office, as fixed by the court, was equal to, or in excess of the amount of his salary."

Coming then to an examination of the two sections in question, we note their provisions, reading as follows:

Section 2911. "*Before entering upon the discharge of his duties, the prosecuting attorney shall give bond signed by a bonding or surety company authorized to do business in this state, or, at his option, by two or more freeholders having real estate in the value of double the amount of the bond over and above all encumbrances to the state in a sum not less than one thousand dollars, to be fixed by the court of common pleas or the probate court, the surety company to be approved by either of such courts, conditioned that he will faithfully discharge all the duties enjoined upon him by law, and pay over, according to law, all moneys by him received in his official capacity. The expense or premium for such bond shall be paid by the county commissioners, and shall be charged to the general fund of the county. Such bond, with the approval of such court of the amount thereof and sureties thereon, and his oath of office indorsed thereon, shall be deposited with the county treasurer.*"

(Emphasis added.)

Section 3004. "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county.

Provided that *nothing shall be paid* under this section *until* the prosecuting attorney *shall have given* bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court with sureties to be approved by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him, by law, and pay over, according to law, all moneys by him, received in his official capacity. Such

bond with the approval of such court of the amount thereof and sureties thereon and his oath of office *inclosed therein* shall be deposited with the county treasurer. * * *

(Emphasis added.)

One cannot read these two sections without being impressed by the fact that their language relative to the bond is not only similar but in most respects identical. In each case the amount of the bond is to be fixed by the court of common pleas or the probate court with sureties to be approved by either of such courts. The bonds in each case are to be conditioned that the prosecuting attorney "will faithfully discharge all the duties enjoined upon him by law and pay over according to law all moneys by him received in his official capacity".

It will be noted that the bond mentioned in Section 2911 General Code, must be given before the prosecuting attorney enters upon his duties, whereas the bond referred to in Section 3004 need not be given until he desires to draw on the appropriation. That difference would not, however, lead to a conclusion that two bonds are required. Section 2911 says that he "shall give" the bond before entering upon the discharge of his duties, while Section 3004 says that he "shall *have given*" bond before he can draw on the appropriation. The words "shall have given" rather imply that a previously executed bond in the required amount is all that the statute requires, and on reason it would appear that if the bond given when he took office was in an amount equal to his salary, it would be a complete compliance with the requirement of Section 3004.

However, we find in the closing sentences of these two sections of the statutes words which appear to me to suggest a legislative intention to require a separate bond under Section 3004. It will be noted that the two sections quoted conclude with practically the same language relative to the deposit of the bond, excepting that instead of the words "endorsed thereon" referring to the oath of office, in Section 2911, the words "inclosed therein" are used in Section 3004. This distinction would appear to point to the existence of two bonds since the oath of office is to be *endorsed upon* the one and *inclosed in* the other. The provisions that an officer is to give a bond and that the oath of office is to be "endorsed thereon" appear in the statutes many times with reference both to state and county officers, but just what the legislature meant by the words, "inclosed therein", is not easy to determine.

I can not believe that the legislature intended that there must be a second oath of office taken by the prosecuting attorney, even though we are forced to conclude that he must give a second bond. Without attempting to determine what was meant by the use of the words, "inclosed therein", we cannot escape the conclusion that they mean something different from "endorsed thereon", and that both phrases could not relate to the same instrument, and therefore that the legislature intended the bond under Section 3004 to be independent of that required by Section 2911 General Code.

I am informed by the Bureau of Inspection and Supervision of Public Offices that the practice formerly prevailing of requiring but one bond was changed by reason of a decision of the Supreme Court rendered in 1941 in the case of State, ex rel. Mettler vs. Stratton; 139 O. S., 86. That was an action in mandamus brought by the prosecuting attorney to compel the county commissioners to make an appropriation for an amount authorized under Section 3004, General Code. The court held:

"4. Before a prosecuting attorney may draw or expend any of the allowance authorized by Section 3004, General Code, he must deposit with the county treasurer a bond in the form provided in such section.

5. A petition in mandamus filed August 20, 1941, which seeks to compel the county commissioners to make an appropriation to the prosecuting attorney of the county to cover the amounts fixed by the judge of the Court of Common Pleas under Sections 2914, 2915 and 2915-1, General Code, as well as the amount authorized under Section 3004, General Code, and which alleges that 'there was sufficient anticipated revenue in the general fund on such 31st day of March, 1941, not already encumbered by mandatory appropriations,' but which contains no allegation that there is money in the county treasury unencumbered and unappropriated from which such appropriation may be made, is demurrable."

The statement of the issues made by the pleadings makes no reference to the matter of the bond nor does it appear that it was necessary to the decision, and the court treats that feature of the case rather lightly. The only reference to it in the opinion is the following:

"Besides, the petition does not show that relator has complied with Section 3004 by giving the bond required therein. Hence, there is no showing that relator has qualified himself to

draw from the county treasury the amount already appropriated.”

It will be noted even here that while the court says the petition was faulty in not showing that relator has complied with Section 3004 General Code, by giving the bond required therein, the court does not say that that bond must be a different bond or in addition to that required by Section 2911 General Code. No reference is made in the opinion to Section 2911 or to the question whether two bonds are required of the prosecuting attorney and it would be consistent with the opinion that the bond contemplated by Section 2911 General Code, if sufficient in amount might answer the purposes also of Section 3004.

Because, however, of the language of the two sections hereinabove quoted, I feel obliged to overrule opinion No. 4863, rendered January 6, 1933, and found in 1932 Opinions, Attorney General, p. 1469, and to hold that compliance with Section 2911 as to the bond of the prosecuting attorney even though it be in an amount equal to or in excess of his annual salary, is not a sufficient compliance with Section 3004 General Code, and the prosecuting attorney in order to be entitled to draw on an appropriation made pursuant to such Section 3004 must give a separate bond in an amount not less than the amount of his official salary.

Respectfully,

THOMAS J. HERBERT

Attorney General