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BOND—CLERK—BOARD OF EDUCATION—AMOUNT AND SURETY MUST BE APPROVED BY BOARD—PAYABLE TO STATE—MAY NOT BE CONTINUATION OF BOND EXECUTED BY CLERK FOR ANY PRECEDING TERM OF OFFICE—SECTION 3313.25 RC.

SYLLABUS:

The bond required to be furnished under Section 3313.25, Revised Code, by the clerk of the board of education must be in such amount and with such surety as approved by the board, payable to the state, and conditioned for the faithful performance of all of the official duties required of such clerk during his prospective term of office, and may not be a continuation of a bond executed by such clerk for any preceding term of office.

Columbus, Ohio, January 7, 1955

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

“Boards of education must elect a clerk of the board (R. C. 3313.22) who may be elected for a term not to exceed four years. It is further provided (R. C. 3313.25) that such clerk before entering upon the duties of his office shall execute a bond, in an amount and with surety to be approved by the board—condition for the favorable performance of all the official duties required of him.

“It has been the practice of certain school boards in connection with the election of the clerk of the board to permit the clerk to file a ‘continuation certificate’ of the original bond when such clerk is reappointed for a subsequent term or terms.

“Thus, a clerk who serves for a period of ten years might be elected and re-elected, assuming he serves a one year term, ten times and the liability of the surety under the ‘continuation certificate’ would only be the amount of the bond issued at the time of his entering upon the duties of his office.

“An opinion is requested as to whether or not such clerk upon re-election by the board must furnish a new bond for each term of office as the board may direct.”

Section 3313.25, Revised Code, states :

“Before entering upon the duties of his office, the clerk of each board of education shall execute a bond, in an amount and with surety to be approved by the board, payable to the state, conditioned for the faithful performance of all the official duties required of him. Such bond must be deposited with the president of the board, and a copy thereof, certified by him, shall be filed with the county auditor.”

From the foregoing statute it can be seen that the clerk of each board of education must, before entering upon his duties, execute a bond payable to the state, in such amount and with such surety as is approved by the board of education, the condition of the bond to be faithful performance of all official duties required of such clerk. While it can be seen from the statute that the clerk of each board of education must, before entering upon his duties, execute a bond for the faithful performance of those duties, the approval of the amount and surety is left to the discretion of the board of education.

In Opinion No. 546, dated July 17, 1951, Opinions of the Attorney General for 1951, page 276, at page 279, in discussing the purpose of such official bond, I said :

“The manifest purpose of requiring such bonds to be given, and to be made in favor of the state as obligee, is to protect the public from loss which may occur from a failure on the part of any such employe to perform his duties in accordance with law or to account for moneys or property which may come into his possession or under his control.”

It follows then that if the purpose of an official bond made in favor of the state is to protect the public from loss occurring from the failure on the part of an officer to perform his duties in accordance with law, or to account for moneys or property which comes into his possession or control during his term of office, there should be some correlation between the amount of money to be handled by the officer during his term and the nature of the duties of the officer and the amount of bond approved by the agency given that discretion, in this instance the board of education. It must be assumed then that in exercising its discretion the board of education will take into consideration the nature of its clerk's duties and the amount of money and property coming into his control during his prospective term of office.

Now, if the board of education has exercised its discretion in a proper manner in fixing the amount of the bond furnished by its clerk during any one term of office, this should be sufficient to indemnify the state against loss through any potential defalcation during that period and the bond will be answerable for such losses occurring during the term. Thus, it is possible that even after the term of office for which the bond has been given has expired, should any deficiency be discovered the surety may be answerable unless otherwise excused. In such circumstances it is possible that undiscovered defalcations might have encumbered the entire amount of the bond even though such encumbrance might not be apparent until long after the completion of the term for which it was given. Such a bond, merely continued beyond the term of office of the officer executing it in the sense of making the original bond applicable to the new term, would be no bond at all for a succeeding term of office.

When a fidelity bond is given it is for a specific amount to cover a particular period of time. See 43 American Jurisprudence, 182, Section 408. Such a bond will cover losses occurring during that period not in excess of the amount agreed upon by the surety. When a subsequent bond is given for a subsequent period of time, that bond will cover the amount of loss during such subsequent period not in excess of the amount specified in the subsequent bond. The bond given for the preceding period does not in any way indemnify the state for losses occurring after the period for which the bond was given nor would a bond given for a subsequent period cover any losses occurring before the execution of that subsequent bond, but the amount of each bond is available only to take care of losses occurring during the term of office for which the bond was given.

As stated in 43 American Jurisprudence, page 183, Section 410:

“* * * For the general rule is that when an officer gives two or more successive bonds, liability falls only upon the sureties on the bond or bonds in force when the default occurs.”

The manner in which the renewal of a bond insuring the fidelity of an officer or employee affects the limits of the indemnity depends on the terms of the bond. However, when a bond given for a preceding period of time is simply “continued in effect,” there is but one amount available to take care of losses occurring during the first and the subsequent terms of office.

It is said in 50 American Jurisprudence, 1145, Section 366, in part as follows:

“* * * A bond and the renewal thereof are, * * *, ordinarily construed as a continuing contract which, in the same manner as a life insurance policy, is continued in force by the payment of annual premiums, and where the liability of the surety is limited in the bond to a specified sum, the surety may not be held liable in excess of the penalty named although defaults may have occurred during two or more terms while the bond was in force. * * *” (See also annotation 42 A. L. R., 834)”

I assume, as you have suggested in your inquiry, that we are here concerned with a continuation certificate which merely extends the period of coverage of an existing bond and is not of such legal effect as to constitute the execution of a new bond in identical terms for a subsequent period.

Now, if the board of education has exercised discretion in a proper manner, that is, taken into consideration the requirements as to adequacy of a bond for a particular term, it is obvious that the continuation of that bond for a succeeding term of the clerk of the board of education might be an abuse of the board's discretionary power, for a bond considered adequate for a four year period might be entirely inadequate to cover a period of six or twelve or sixteen years.

Under normal circumstances, members of the board of education would not be in position to judge whether there had been any defalcation on the part of its clerk immediately at the end of his term of office and before a new term of office is to begin, for as a practical matter it is a rare occasion when an audit of accounts begins immediately at the close of one term, and in all probability such an audit would not be completed before the beginning of a new term of office on the part of the clerk of the board of education. Thus, as indicated above, what may appear on its face to be a bond may be no bond at all if the amount for which it was originally given has been completely exhausted by reason of being encumbered by losses occurring during the preceding term. Since in order to exercise its discretion, a board of education must know the value of the bond it is receiving on behalf of the state for its clerk, the board should ask for and require a wholly new bond for the period of the term of the clerk, the amount of which bond being determined after due consideration of the nature of the duties of the office of the clerk and the amount of

money and property which might come under his control during said term of office.

In specific answer to your question, it is my opinion and you are advised that the bond required to be furnished under Section 3313.25, Revised Code, by the clerk of the board of education must be in such amount and with such surety as approved by the board, payable to the state, and conditioned for the faithful performance of all of the official duties required of such clerk during his prospective term of office, and may not be a continuation of a bond executed by such clerk for any preceding term of office.

Respectfully,

C. WILLIAM O'NEILL

Attorney General
