

strued in *pari materia* therewith, for the reasons set forth above, it is my opinion that a minor, employed by the Superintendent of Banks in connection with the liquidation and distribution of assets of closed banks, pursuant to the provisions of Section 710-94, et seq., of the General Code, is not amenable to the provisions of said Section 12966 of the General Code.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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1432.

RETIREMENT BOARD, STATE TEACHERS RETIREMENT  
SYSTEM—BIDS ON BONDS—NOT REQUIRED TO FILE  
BONDS OR CERTIFIED CHECK, WHEN.

*SYLLABUS:*

*When the Retirement Board of the State Teachers Retirement System bids upon bonds advertised pursuant to the provisions of Section 2293-28, General Code, such Board is not required to file with its bid a bond or certified check as provided in such section.*

COLUMBUS, OHIO, November 5, 1937.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

GENTLEMEN: Your letter of recent date is as follows:

“Section 2293-28, G. C., provides that when bonds are sold ‘Every bidder shall file with his bid a bond or certified check in an amount specified in the advertisement but not less than one per cent of the amount of the bonds or notes to be sold.’

Will you kindly render your opinion as to whether the foregoing provision requires this Board to put up such certified check or bond when bidding upon bonds therein referred to.”

Section 2293-28, General Code, to which you refer, being one of the sections of the Uniform Bond Act, provides that all bonds and notes issued thereunder having a maturity of more than two years, after being rejected by the trustees or commissioners or other officers

having charge of the sinking fund of the issuing subdivision, shall be sold to the highest bidder after advertisement which shall be published and contain the information set forth in such section. The only mandatory duty imposed upon "every bidder" for such bonds or notes is that contained in the last sentence of such section quoted in your letter that a bond or certified check shall be filed with his bid.

There is immediately suggested an application of the well established doctrine that in the absence of express provision therefor the sovereign state is not bound by its own laws. The phrase "every bidder" in the portion of Section 2293-28, supra, obviously makes no express reference to the State government. The question is accordingly not unlike that under consideration in my recent Opinion No. 1431, the second branch of the syllabus reading as follows:

"There being no special provisions in Sections 1008 to 1008-11, inclusive, and Section 12996, and sections which must be construed in *pari materia* therewith, relating to the hours of employment of females and minors, making such employees of the State of Ohio amenable to said provisions of law, females and minors so employed are not amenable to said provisions of the Code on the principle that the State is not bound by the terms of a general statute unless it be so expressly provided."

The foregoing opinion was based upon the case of *State ex rel. vs. Cappeller*, 39 O. S. 207, and reference to the text and numerous authorities cited in 37 O. Jur. pp. 804 and 805.

In the instant case, however, your question need not be entirely determined upon a consideration of the foregoing legal principle. Section 7896-16, General Code, provides that your board shall have full power to purchase, among other securities therein set forth, bonds, notes and certificates of indebtedness of any county, city, village or school district of the State of Ohio. This last mentioned section also provides the manner in which funds shall be drawn from the custody of the Treasurer of State, who by virtue of Section 7896-13 is made the custodian of the retirement fund. The only authority vested in the Treasurer of State to honor and pay vouchers in connection with the purchase of bonds, notes and certificates of indebtedness, etc., authorized to be purchased by the Retirement Board, is predicated upon such bonds, notes, certificates of indebtedness, etc., being delivered to him. The pertinent language of such section is as follows:

“\* \* \* The treasurer of state shall honor and pay all vouchers drawn on the retirement funds for the payment of such bonds, notes, certificates of indebtedness, mortgage notes or debentures upon delivery of said bonds, notes, certificates of indebtedness, mortgage notes or debentures to him when there is attached to such vouchers a certified copy of such resolution of the board authorizing the purchase of such bonds, notes, certificates of indebtedness, mortgage notes or debentures; \* \* \*.”

No authority has been conferred upon the Retirement Board to draw vouchers to secure a bid submitted for the purchase of bonds, nor is any authority conferred upon the Treasurer of State to certify such vouchers in any way, even if a certified voucher were to be considered as a certified check within the meaning of the term as used in Section 2293-28, supra. The statute providing the mode of payment of vouchers drawn for the purchase of bonds by your Board, to-wit, upon delivery of same to the Treasurer of State, it is my judgment that the mode specified is likewise the measure of the power. This principle of statutory construction was applied by the Supreme Court to a municipal corporation in the case of *Frishbie Co. vs. East Cleveland*, 98 O. S. 266, the first branch of the syllabus reading as follows:

“Where a statute prescribes the mode of exercise of the power therein conferred upon a municipal body, the mode specified is likewise the measure of the power granted, and a contract made in disregard of the express requirements of such statute is not binding or obligatory upon the municipality.”

Section 2293-28, supra, provides that either a certified check in the amount therein specified or a bond in a similar amount shall be filed. I have shown that there is no authority whereby your board may post a certified check. There is similarly a lack of authority in your board to execute such a bond.

Were there any doubt remaining as to this requirement not being applicable to the State, that doubt might well be resolved by a consideration of Section 348 of the General Code, providing that “No undertaking or security shall be required on behalf of the State or an officer thereof in the prosecution or defense of any action, writ or proceeding.” The steps taken in the authorization, issuance and sale of bonds have been repeatedly held to be “proceedings” within

the meaning of the term as used in Section 26 of the General Code, referring to the effect of an amendment of a statute upon pending "actions, prosecutions or proceedings." See an opinion appearing in Opinions of the Attorney General for 1931, Vol. III, page 1359 at 1364, citing a number of Supreme Court cases and previous opinions on this point. The courts having construed the language of Section 26, General Code, "pending actions, prosecutions or proceedings, civil or criminal" as not being limited to court proceedings, by a parity of reasoning it may be urged that the language of Section 348, General Code, "prosecution or defense of any action, writ or proceeding" is similarly not limited to proceedings which are prosecuted in court. In such view such Section 348 would itself be dispositive of your inquiry. However, your inquiry need not be resolved by a determination of this specific point in view of the lack of authority in your board to post certified checks or bonds and the failure of the General Assembly to include the State in the provision of Section 2293-28, General Code, here under consideration.

In reaching the foregoing conclusion construing the provisions of such Section 2293-28 here under consideration as not applicable to the State, I am not unmindful of the principle of law that in construing a statute which is susceptible to two constructions one of which would render it constitutional and the other unconstitutional, the courts will adhere to the former construction. See 37 O. Jur. 624, 625, citing innumerable authorities in support of this principle. As to this, comment should be made upon the case of *State, ex rel vs. Frazine*, 110 O. S. 523, in which the court held unconstitutional the former provisions of Section 1465-58, General Code, requiring municipalities before advertising a bond issue for sale to first offer the same to the Industrial Commission at par and accrued interest. The basis of the decision of the court is clearly shown in the following language of the opinion appearing on pages 530 and 531:

"We therefore hold that in the enactment of Section 1465-58, General Code, the Legislature attempted to require municipalities and other taxing districts to offer their bonds to the Industrial Commission of Ohio at par and accrued interest before offering them to the general public; that a compliance therewith enables the Industrial Commission to deprive municipalities and other taxing districts of premiums which are usually received on the sale of bonds, which premiums lawfully belong to the municipality, or other taxing district, by which deprivation the taxes of the district are necessarily increased in an amount equal to such premiums;

that the Legislature is without power to authorize the raising of any part of the workmen's compensation fund by any other process than by compulsory contributions by employers; that its power to require municipalities and other taxing districts to contribute to such fund is limited to the obligation of such municipalities and other taxing districts as employers; and that that portion of Section 1465-58, General Code, which requires municipalities and other taxing districts to first offer their bonds to the Industrial Commission at anything less than their market value, is unconstitutional and void."

It is perfectly apparent that the fact that Section 2293-28, *supra*, imposing no requirement on the State when bidding for bonds to post a bond or certified check, is not subject to the constitutional infirmities of former Section 1465-58, General Code, considered in the Frazine case, *supra*.

Specifically answering your inquiry, therefore, and in view of the foregoing, it is my opinion that when the Retirement Board of the State Teachers Retirement System bids upon bonds advertised pursuant to the provisions of Section 2293-28, such Board is not required to file with its bid a bond or certified check as provided in such section.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

1433.

APPROVAL—BONDS OF PIKE TOWNSHIP RURAL SCHOOL DISTRICT, FULTON COUNTY, OHIO, \$34,000.00.

COLUMBUS, OHIO, November 5, 1937.

*The Industrial Commission of Ohio, Columbus, Ohio.*

GENTLEMEN :

RE: Bonds of Pike Twp. Rural School Dist., Fulton County, Ohio, \$34,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise all of an issue