

4274

BOND TO PERMIT DEPUTY SHERIFF TO GO ARMED —
COUNTY COMMISSIONERS MAY NOT PAY PREMIUM FROM
PUBLIC FUNDS — SECTION 12819 GENERAL CODE.

SYLLABUS:

The premium on the bond prescribed by Section 12819, General Code, which bond permits a deputy sheriff to go armed, may not be paid from public funds by the board of county commissioners.

Columbus, Ohio, October 4, 1941.

Hon. Harold K. Bostwick, Prosecuting Attorney,
Chardon, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 12819 provides that deputy sheriffs may go armed if they give bond to the State of Ohio, in the sum of \$1000.00, and Section 9573-1 provides that the premium on the bond of any public officer, deputy or employee shall be allowed and paid by the state, county, etc. of which such person so giving such bond, is such officer or deputy.

Now, my question for your opinion is, can the county commissioners of Geauga County by virtue of Section 9573-1 lawfully pay the premium on the concealed weapon bond of the deputy sheriff required under Section 12819.”

Section 9573-1, General Code, to which you refer in your inquiry, reads as follows:

“The premium of any duly licensed surety company on the bond of any public officer, deputy or employe shall be allowed and paid by the state, county, township, municipality or other subdivision or board of education of which such person so giving such bond is such officer, deputy or employe.”

In construing this right of the state, county, township, municipality or other subdivision to expend public funds for the purpose of paying

the premium on the bond of public officers, deputies or employes, it is necessary to bear in mind the elementary principle that funds derived from taxation may only be expended for public purposes. It follows, therefore, that unless the public, as such, might suffer a loss by reason of the event or occurrence insured against, the expenditure would be improper.

The bond required of a deputy sheriff as a condition precedent to the right to go armed, while conditioned to save the public harmless by reason of any unlawful use of such weapon carried by the deputy, runs only to individual persons injured by such an improper use.

Section 12819, General Code, with reference to the bond of deputy sheriffs, conferring on them the privilege to go armed, provides as follows:

“ * * * Provided further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond.”

From the foregoing it is evident that the consideration for the premium of the bond in question, hereinafter referred to as a weapon bond, is forthcoming and dependent upon an injury resulting from an unlawful use of a weapon. Under no circumstances could an unlawful use render a county liable for such acts of the deputy and hence any expenditure made by the county in this regard would constitute mere philanthropy for the purpose of exonerating a public officer or employe from any personal liability for his unlawful acts.

It is my opinion that the term “bond” as used in Section 9573-1, supra, is solely referable to faithful performance bonds which certain officers may require of their employes. Section 2981, General Code, with respect to county officers and employes, reads in part as follows:

“ * * * Each of such officers may require such of his employes as he deems proper to give bond to the state in an amount

to be fixed by such officer with sureties approved by him, conditioned for the faithful performance of their official duties.
* * * ”

The difference between the faithful performance bond and the weapon bond is readily distinguishable, the former inuring to the benefit of the state or subdivision, as well as to persons unlawfully injured by the nonfeasance, misfeasance or malfeasance perpetrated by an officer and the latter inuring only to the benefit of such person or persons that may be injured by the improper use of a dangerous weapon. On the one hand the expenditure of public funds may result in a benefit to the subdivision so authorizing the expenditure for it is conceivable that a public officer covered by a faithful performance bond might breach his duty by a failure to account or by absconding and thus render his bondsman liable to the subdivision. In the case of the weapon bond, however, it is difficult to conceive of any situation where the improper use of a weapon by a deputy sheriff would result in a loss to the subdivision. While a factual situation might be possible where a deputy, when acting either by virtue of or under color of his office, improperly or unlawfully made use of a weapon, still, in such a case, the position of the county would remain governmental and as such it would have a complete defense to any action instigated by a member of the public who has suffered injuries.

The fact that the premium of a faithful performance bond may be allowed and paid by the state, county or other subdivision and that such a bond has been construed by the Supreme Court of Ohio in the case of *The American Guaranty Company v. McNiece*, 111 O.S. 532, as being broad enough to fix liability in case of an unlawful use of a weapon by an officer, it does not follow that the county may expend public monies to pay the premium of a weapon bond. As stated above, the faithful performance bond is primarily for the benefit of the state or subdivision and while incidentally it may run to individuals in certain cases because so conditioned, the weapon bond runs only to individuals and never to the state or subdivision.

To construe the term “bond” as used in Section 9573-1, supra, to include within its meaning a weapon bond, in view of the safeguards surrounding the expenditure of public monies, would cast grave doubts as to the constitutionality of the statute and since it is incumbent to construe laws so as to prevent constitutional infirmity, it is my opinion that

the premium on the bond prescribed by Section 12819, General Code, which bond permits a deputy sheriff to go armed, may not be paid from public funds by the board of county commissioners.

Respectfully,

THOMAS J. HERBERT,

Attorney General.