

make such an agreement and carry it out would, in my opinion, be a violation of the trust reposed in the university authorities and would be beyond their power to make.

If, at any time during the progress of an investigation, it appears that funds are necessary to complete the investigation, and the advisory council requires a cooperator to furnish those funds, the funds so furnished, if reasonably commensurate in amount with the beneficial results of the investigation, may be a valid consideration for an agreement to forego the publishing of the results of the investigation and to assign to the cooperator who furnishes the funds any patents that may be obtained as a result of the work of the researches so conducted.

The statement of the former opinion that the right of the contributor to patents growing out of such investigation should previously be fixed by contract "*before the investigation starts*" is possibly too narrow. Such an agreement to assign the results of an investigation or patents obtained as a result thereof to a cooperator may no doubt be made at any time, so long as the consideration therefor is a valuable consideration and sufficiently adequate that it may not be said that the university authorities abused their powers by reason of its inadequacy.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3400.

OMNIBUS BOND—COVERING OFFICERS AND EMPLOYES OF POLITICAL SUBDIVISION—SIGNATURES OF VARIOUS EMPLOYES UNNECESSARY—DESIGNATION BY POSITIONS RATHER THAN BY NAMES SUFFICIENT—INCORRECT HEADING OF SCHEDULE OF POSITIONS NOT BAR TO SURETY LIABILITY FOR ALL EMPLOYES OF A DEPARTMENT, WHEN.

SYLLABUS:

1. *The faithful performance of duty by any number or a group of the officers or employes of a municipality or other political subdivision may be guaranteed by the provisions of a single or omnibus bond purporting to cover each or all of said officers or employes.*

2. *It is not necessary that the officers or employes, the faithful performance of whose duties the bond purports to guarantee, be designated by name, in such instrument or in the schedule attached thereto. It is sufficient that the position or office be designated.*

3. *An official bond purporting to guarantee the faithful performance of duty of a public officer or employe is not necessarily rendered invalid by reason of the fact that the principal does not join in the execution of the instrument by affixing his signature thereto, where such bond is executed by a bonding company for a valuable consideration and the form of the instrument and the whole transaction discloses that it was never intended that the officer or employe covered by the bond was to join in its execution or its obligation.*

4. *The contractual obligation of the signer of such a bond is primary and not that of a surety. Maryland Casualty Company v. McDiarmid, 116 O. S., 576.*

5. *Where an instrument of the kind described in syllabus No. 3 above, recites in the body thereof that the contract is made with a certain department of a*

municipality and purports to cover officers, employes and positions listed on a schedule attached thereto, it will be construed as covering all officers, employes and positions in the department so listed, even though the heading of the schedule may indicate, inadvertently or otherwise, that the officers, employes and positions listed therein are in a certain branch or division of the department, whereas as a matter of fact, some or all of those listed are in a different branch or division of the particular department than the heading indicates.

COLUMBUS, OHIO, July 3, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

“Enclosed herewith is a copy of a group system bond for positions as found on the ‘Schedule of Positions’ attached to the bond. We have set forth only three types of officials, being representative of 48 employes supposedly covered by the bond.

Question 1. Is it essential to the validity of an official bond that the principal enter into the execution of the instrument by affixing his signature thereto?

Question 2. Is it necessary that the principal be named in the bond or may the position alone be indicated?

Question 3. Does the fact that the schedule of positions is titled ‘Division of Water and Heat’ operate as a bar to the recovery of losses sustained through officials listed in said schedule who are employed in other divisions of the city government?

The City of Cleveland ordinance relating to official bonds is also enclosed herewith.”

With your letter there is enclosed a copy of Section 79 of Ordinance No. 76959 of the City of Cleveland, whereby it is provided that certain designated officers and employes of the City of Cleveland shall give bonds for the faithful performance of their duties and the correct accounting for, and delivery to the city of all moneys or other property coming into their custody and belonging to the city or for the care of which the city is responsible.

There is also enclosed a copy of an instrument designated as “Official Bond, City of Cleveland” by the use of which, or an instrument or instruments similar thereto, the authorities of the city of Cleveland have sought to satisfy the requirements of the ordinance above mentioned with respect to the bonding of certain of their officials and employes. The instrument in question is in the form following:

“KNOW ALL MEN BY THESE PRESENTS, That the EAGLE INDEMNITY COMPANY, a surety company organized under the laws of the State of New York, and authorized to write surety bonds in the State of Ohio, as surety, are held and firmly bound unto the CITY OF CLEVELAND, OHIO, DEPARTMENT OF PUBLIC UTILITIES, DIVISION OF LIGHT, WATER, HEAT AND POWER, in the penal sums set opposite the names of the positions listed in the attached schedule for the payment of which, well and truly to be made, the said EAGLE

INDEMNITY COMPANY hereby binds itself, its successors and assigns firmly by these presents.

THE CONDITION OF THIS OBLIGATION is such, that whereas, certain individuals have heretofore been elected or appointed to fill the positions listed in the schedule attached hereto.

NOW, if each of the said occupants of such positions shall faithfully, honestly and impartially perform and discharge the duties of such position while he shall hold the same, in accordance with the laws of the State of Ohio, and the Charter and Ordinances of the City of Cleveland, and shall duly account for and pay over all monies or other things of value that shall come into his possession for the account of said City or any officer or department thereof, then this obligation shall be void, otherwise to remain in full force and virtue in law.

This bond is given for an indefinite period and shall remain in full force and effect, and shall not be terminated by the surety until the expiration of ten (10) days after the receipt of written notice by the Director of the Department of which the occupants of said positions are employed, stating such intention to terminate the liability of the surety hereunder.

The liability of the surety on this bond for the sums named in the attached schedule represents the limit of liability of the surety for each year during which this bond remains in force, and the liability for defaults occurring during each year shall be represented by the amounts named in the aforesaid schedule attached hereto during each of the years through which it may be renewed, and shall not be construed to be the maximum of liability during any period longer than one (1) year.

In the event of an individual occupying at one time or at different times, more than one position, the surety shall not be liable in any one year for a greater amount in the aggregate, for loss caused by the act or acts of such individual, than the largest single amount set opposite any one such position.

IN WITNESS WHEREOF the surety has had this bond executed by its duly authorized officers and its seal affixed this 1st day of May, 1930."

This instrument is signed by the Eagle Indemnity Company by its Resident Vice-President and Resident Assistant Secretary, and there is affixed the seal of the Eagle Indemnity Company. The instrument is approved as to legal form and correctness by the Director of Law of the City of Cleveland. Attached thereto is a statement setting forth three types of officials, to-wit: "Secretary to Director," "Head Storekeepers" and "Civil Engineer," together with the amounts of insurance or liability which the bond is intended to cover for each of said officials or employes. The names of the occupants of the aforesaid positions are not inserted with the exception of that of civil engineer. The name of Mr. J. E. A. L. follows the words "Civil Engineer" in the said schedule of positions.

By comparison of the form and terms of the instrument set out above, designated as "Official Bond, City of Cleveland," it will be found to be very similar to an instrument which was considered by the Supreme Court of Ohio in the case of *Maryland Casualty Company v. McDiarmid*, 116 O. S., 576, so nearly so, in fact, that it seems apparent that the person who drew the instrument in question had before him the case above referred to. While the forms of the two instruments are not precisely the same their substance and effect are, in my opinion, so nearly

alike as to warrant the conclusion that if the instrument in use in Cleveland should come under the scrutiny of the court, its conclusions with respect thereto would be the same as were those with respect to the instrument considered in the said McDiarmid case referred to above. In that case, suit for damages was brought by McDiarmid against a police officer of the City of Dayton and the Maryland Casualty Company by which it was sought to recover damages against the police officer and to subject the Maryland Casualty Company to the payment of said claim as bondsmen for the said police officer.

By answer, the Maryland Casualty Company admitted that the said officer was a policeman in the employ of the city of Dayton, that it had executed to the city of Dayton an instrument which was called an "omnibus bond" covering many of the officers of the city of Dayton, including the officer in question. This instrument, or "omnibus bond" is set out in full, in the report of the case, and is in substance very similar, to say the least, to the instrument here under consideration. It was signed by the Maryland Casualty Company but not by the police officer whose name did appear, however, in the schedule attached to the bond.

It did not appear that police officers in the city of Dayton at that time were required either by charter or by ordinance, to give bond for the faithful discharge of their duties. It was held by the court, however, that even if the police officers were not required to give a bond, the instrument in question was a valid and binding obligation of the surety company and inasmuch as the form of the instrument disclosed that it was not intended to be signed by the officer in question, the faithful conduct of whom was guaranteed by the obligor to the instrument, the contractual obligation of the obligor was primary and not that of a surety. The first and third branches of the syllabus of this case read as follows:

"1. Where the state, or a political subdivision of the state, takes from any one an indemnity bond for the faithful performance by an officer of official duty, and such bond is voluntarily given, is based upon a valuable consideration and is not prohibited by law or against public policy, liability of the obligor of such bond upon a breach of its condition is enforceable, notwithstanding the execution of such bond is not required by any statute of the state or by the charter or an ordinance of the municipality.

3. Where such bond is executed by a bonding company for a valuable consideration, and the form of the instrument and the whole transaction disclose that it was never intended that the officer covered by the bond was to join in its execution or its obligation, the contractual obligation of the signer thereof is primary and not that of a surety."

It was also held by the court that the contract in question was an official bond within the meaning of the statute of limitations relating to official bonds

There is this difference between the bond here under consideration, and that involved in the McDiarmid case, *supra*. In the McDiarmid case it did not appear that the police officer in question was required either by ordinance or by charter provision, to give a bond. It did appear that the officer in question was designated by name in the schedule to the "omnibus bond" which was executed and which was brought in question in the litigation. Judge Robinson, in his decision of the case indicated that if the record had disclosed that the bond was required by ordinance or by charter the case would have been less complicated but that the court could not take judicial notice of such a requirement if such a requirement did really exist. He stated "we are compelled to treat the bond as though issued without authority of any provision of the charter or act of the legislative body of

the city, which necessarily adds to this case a complication which, by a reasonable degree of painstaking in the trial of the case, might well have been obviated."

Nevertheless, the court held the obligation of the so-called "omnibus bond" to be valid, and if the officer had been required by law or ordinance to give a bond, the conclusion of the court manifestly would have been the same.

Inasmuch as the court held the obligation of the signer of the instrument, to wit the bonding company, to be a primary obligation rather than that of a surety, it would not make any difference, in my opinion, whether the officer or employe whose liability was being guaranteed by the instrument, was named or whether he was simply designated as the occupant of a certain position such as "police officer," "storekeeper," "secretary to director," "civil engineer" or whatnot.

Coming now to your third question. This question, I understand, is prompted from the fact that the contract in question purports, on its face, to be made between the Eagle Indemnity Company and the "City of Cleveland, Ohio, Department of Public Utilities, Division of Light, Water, Heat & Power", whereas the schedule attached thereto, which is referred to in the contract as listing officers, employes and positions covered by the obligation, is headed "Division of Water and Heat", and certain officers and employes and positions are listed thereunder which have nothing to do with water and heat. I am informed, however, in a later communication from you that all the officers, employes and positions listed in the schedule are in the Department of Public Utilities and under the supervision of the Director of Public Utilities of the City of Cleveland, Ohio.

Under the scheme of government adopted by the people of the City of Cleveland, as set up in its charter, there is a Department of Public Utilities, administered by a Director (Sections 37 and 39 of the Charter of the City of Cleveland). The department is not divided, by the terms of the charter, into distinct divisions, although it naturally falls into divisions, and administrative officers no doubt refer to the different divisions for convenience in speaking of the several activities of the department. Just why the schedule came to be headed Division of Water and Heat, I can not say, but regardless of whatever intention might have been in the mind of the person who drew the schedule, if in fact any thought was given to the matter, it could not change the manifest intention expressed in the body of the bond to the effect that the obligation of the bond was intended to cover all positions in the Department of Public Utilities. The phrase "Division of Light, Water, Heat and Power" is simply descriptive of the activities of the Department of Public Utilities and may be regarded, in my opinion, as mere surplussage, both in the body of the bond and the heading of the schedule. It is my opinion that the faithful performance of duty on the part of any officer, employe or position listed in the schedule which is under the supervision of the Director of Public Utilities is covered by the bond, if the premium covering the risk was paid, which I assume has been done.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3401.

APPROVAL, BONDS OF HOPEWELL TOWNSHIP RURAL SCHOOL DISTRICT, PERRY COUNTY, OHIO.

COLUMBUS, OHIO, July 6, 1931.

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