

Opinion No. 59-164

October 14, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. T. T. Sanders, Jr. Attorney at Law P. O. Box 939 Roswell, New Mexico

{*255} This is in response to your recent request, as attorney for the New Mexico Military Institute, for our opinion in regard to the following questions:

1. Is the bond of Colonel C. J. Rohr, Adjutant of the New Mexico Military Institute, sufficient to comply with the provisions of Chapter 248, Section 16, Laws of 1957, now compiled, as amended, in § 4 - 4 - 2.16, N.M.S.A., 1953 Compilation (P.S.)?
2. Does the language of § 4-4-2.16, to-wit, "The Official or governing authority of the state agency or local public body shall be chargeable upon his official bond for the chattels and equipment as shown in the inventory together with all additions made thereto since the prior inventory", refer to the Board of Regents of the New Mexico Military Institute and similar institutions or does it refer to the particular individuals in charge of the inventories?
3. Is there any fixed amount of the bond referred to in § 4-4-2.16 and if not, who has the authority to fix the amount of the bond?
4. Should all official Fidelity bonds written after the effective date of Chapter 248, Section 16, Laws of 1957, include an express provision that such bond covers chattels and equipment as shown on inventories or does such statute by implication include such coverage?

Our answers to your questions are as follows:

1 and 2. The language of § 4-4-2.16 does not refer to Colonel Rohr's official bond, but refers to the statutory bond required of the Secretary and Treasurer of the New Mexico Military Institute. However, see our opinion for an analysis of these questions.

3. Insofar as this question concerns the New Mexico Military Institute, § 73-28-2 sets the minimum amount of the bond and such bond must be approved by the Board of Regents.

4. All official bonds written after the effective date of Chapter 248, Section 16, Laws of 1957, now codified as part of Section 4-4-2.16, must contain an express provision meeting the requirements of the statute.

We shall answer your questions 1 and 2 together. Section 4-4-2.16 provides, in essence, that the governing authority of all state agencies and local public bodies shall

conduct a physical inventory of movable chattels and equipment costing \$ 10.00 or more under their control and, after certification of the inventory, satisfy the State Auditor, his employee or independent auditor of its correctness. The New Mexico Military Institute is clearly a state agency as defined by § 4-4-2.1. Section 4-4-2.16 further provides that the official or governing body shall be chargeable on his official bond for the chattels or equipment as shown on the inventory. In our opinion, the bond {256} referred to in this section is the bond required by statute of officials of state agencies to cover the performance of their official duties. In the case of the New Mexico Military Institute, this bond is required by § 73-28-2, which, in essence, requires that the Secretary and Treasurer of the Board of Regents shall execute a good and sufficient bond to the State of New Mexico with some solvent surety company doing business in the state in a sum to be set by the Board of Regents of not less than \$ 20,000, which bond shall be approved by the Board of Regents and kept on file as they direct.

We do not have a copy of this bond before us; however, you have orally informed us that such bond contains the same condition as the bond covering Colonel Rohr's performance. We have examined Colonel Rohr's bond and are of the opinion that the condition contained therein is sufficient to meet the requirements of the Act. This condition reads as follows:

"NOW, THEREFORE, if the above bounden, shall from the 1st day of September, 1946, well and faithfully perform all his duties as such, during his term of office and until his successor is elected or appointed, and qualified, and shall exercise all possible diligence and care in the collection of all monies which it is his duty by law to collect and shall render true accounts of his office and his doings therein as required by law and pay over all monies that may come into his hands by virtue of his said office, to the officers and persons authorized by law to receive the same and carefully keep and preserve all books and papers and other property appertaining to his office and deliver same to his successor in office when duly qualified, then this obligation to be void, otherwise to remain in full force and effect, provided, however, that the Surety shall have the right to terminate its suretyship under this obligation by serving notice of its election to do so upon the officer or officers whose duty it is to approve this bond, thirty days prior to the date of such termination of suretyship, and thereafter the said Surety shall be discharged from any liability hereunder for any default of the principal occurring after such termination of liability."

Although this condition does not specifically mention inventories it does provide that the official concerned shall keep and preserve all property appertaining to his office. Such bond was prepared on a printed form of the surety company, and the general rule is that a fidelity bond is to be construed against the party who drafted it. **Wilhoit, Director of Banking, et al v. Furnish et al.**, 295 Ky. 356, 174 S. W. 2d 515 (1943). Further, the courts have generally held that a fidelity bond of a public officer is to be construed to preserve the public funds. **Holland, Governor v. American Surety Company of New York**, 149 Fla. 285, 6 So. 2d 280 (1942). Therefore, assuming that the bond of the Secretary and Treasurer contains the same condition as that covering Col. Rohr, such bond is sufficient.

We might point out, however, that while in our opinion, the bond is sufficient to comply with the statutory requirements, the question is not free from doubt. Therefore, we suggest that an abundance of caution would require additional language in the bond condition to the effect that it includes inventories under the provisions of Section 4-4-2.6, N.M.S.A., 1953 Compilation (P.S.)

Colonel Rohr's bond is not such a bond as contemplated by the statute. As you have stated, Colonel Rohr is an employee of the Institute and is not an "official or governing authority" as contemplated by the statute.

Your third question is answered simply by reference to the above cited § 73-28-2, which states that the {*257} bond of the Secretary and Treasurer of the Institute must be in a sum of not less than \$ 20,000 and must be approved by the Board of Regents.

The answer to your fourth question is that the last paragraph of § 4-4-2.16, taken from Chapter 248, Section 16, Laws of 1957, expressly requires that all official bonds coming under the purview of the Act and written after its effective date must be written in such a manner to include inventory. In our opinion, this means that such an express provision must be included in all such bonds. Of course, this paragraph does not apply to the bond in question, since such bond was written before the effective date of the Act.

Philip R. Ashby

Assistant Attorney General