Opinion No. 75-55

October 7, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mortgage Finance Authority Act Oversight Committee

QUESTIONS

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1. Do the members of the New Mexico Mortgage Finance Authority have to obtain the fiduciary bond required by statute **before** they are qualified to hold their appointive offices?

2. Do the ex officio members have to obtain a fiduciary bond to be qualified to hold office on the Mortgage Finance Authority?

3. Are the actions taken by the members of the Mortgage Finance Authority before they obtain their fiduciary bonds invalid because of their failure to meet the statutory qualifications for their appointive offices?

4. Will the action of the Mortgage Finance Authority taken by members who have not qualified for their offices have to be repeated after the members have qualified for their offices?

CONCLUSIONS

1. Yes.

2. Yes.

3. No.

4. No.

OPINION

*{*147}* **ANALYSIS**

1. Section 13-19-4(B), NMSA, 1953 Comp. provides that:

"All members, officers, employees or agents exercising any voting power or discretionary authority shall be required to have a fiduciary bond in the amount of one million dollars ($ 1,000,000) for the faithful performance of their duties."

While the Statute clearly requires the members of the Authority to be bonded, it does not specify when such bond must be filed. A more general bonding statute, Section 5-2-9, NMSA, 1953 Comp., requires bonding as a **prerequisite** to the discharge of duties of office, stating that:

"Each and every person who may hereafter be elected or appointed to office in this state, required by law to give bond, *{*148}* shall file the same for record before entering upon the discharge of the duties of the office."

If the members of the Authority were subject to this statute, it would then cover the omission of a time specification in Section 13-19-4(B), **supra,** and bonding would be required, by statute, prior to the discharge of duties.

It is doubtful whether Section 5-2-9, **supra** applies to members of the Authority when it refers to "person[s] . . . appointed to office in the state." Although Section 13-19-4(A), NMSA, 1953 Comp. defines the Authority as a "public body" created "for the performance of essential public functions" it also clearly states that the Authority is "separate and apart from the state" and for that reason members of the Authority may not be deemed to hold office in the state within the meaning of Section 5-2-9, **supra.**

We need not, however, rely on a determination that the members of the Authority, as public officers, are subject to Section 5-9-2, **supra,** and thereby are required to file bond prior to the discharge of duties. We draw that conclusion from a construction of Section 13-19-4(B) itself.

The omission of a specified time to file bond renders Section 13-19-4(B) ambiguous and it may therefore be construed to give effect to the legislative intent. **State v. Herrera,** 86 N.M. 224, 522 P.2d 76 (1974). The legislature clearly intended that the members of the Authority be bonded. To rely solely on the statute as written would, however, frustrate this intent. As no specific time is stated, members could file bond at any time or delay indefinitely, thus essentially abrogating the statutory requirement. Under the rules of statutory construction, a literal interpretation which leads to the absurd result of defeating the object of legislative intent must be rejected. **State v. Nance,** 77 N.M. 39, 419 P.2d 242 (1966), **cert. denied,** 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

On the other hand, the rules of construction also hold that words may be read into a stature to express the legislative intent and avoid absurd and unreasonable results. **State v. Clark,** 80 N.M. 340, 455 P.2d 844 (1969). To construe Section 13-19-4(B), **supra,** as requiring bonding **prior to the discharge of duties** would both express the legislative intent and avoid an unreasonable result. The stature directs that members be bonded to insure "the faithful performance of their duties." If the bonding is to insure faithful performance, then it seems obvious that it would have to **precede** that performance. This construction is consistent with public policy.

When a bond is required by law, public policy warrants that such bond be filed prior to the assumption of public duties. The rationale for this policy has been explained in the following fashion:

"Governments are instituted for the benefit governed, and the primary purpose of all government and the creation of offices is for the protection of the citizen in all his rights. Under this theory, bonds are required of those handling public funds, not for the benefit of the office holder in whose possession the funds are placed, but for the protection of the entire citizenship. It is a matter of public policy that security must be given as a condition precedent to a proper qualification for office and for the assumption of the responsibility *{*149}* thereof." **Jones v. Hadfield,** 96 S.W.2d 959, 962, 192 Ark. 224 (1936).

Thus, we conclude, in response to your first question, that the members of the New Mexico Mortgage Finance Authority are required to obtain fiduciary bonds before they discharge the duties of that office. As our conclusion is based on the need for bond to insure faithful performance of duty, we would add that if those duties do not necessarily begin with the assumption of office, it would be sufficient that the bond be a prerequisite only to the discharge of duty and not with the taking of office. See **State v. Nash,** 63 N.E. 83, 65 Ohio State 549 (1902). Compare 5-1-13, NMSA, 1953 Comp.

2. Because Section 13-19-4(B), **supra,** specifically states that "all members" must give bond, we must conclude that ex officio as well as appointive members must be bonded. The fact that ex officio members may be bonded in another capacity does not alter this conclusion. In the absence of a statutory provision to the contrary, a person holding two separate offices must give two separate official bonds. See **People v. Ross,** 38 Cal. 76 (1869).

3. While we have concluded that bond is required of members of the New Mexico Mortgage Authority before they enter upon the discharge of the duties of that office, it does not necessarily follow that the actions previously taken by members of the Authority are invalid. We conclude instead that those who have been acting on behalf of the Authority have been, at least, **de facto** officers and that their acts are valid as to the public.

In **State v. Blancett,** 24 N.M. 433, 174 P. 215 (1918), the court established ". . . three requisites necessary to constitute one an 'officer de facto:' (1) the office held by him must have a jure existence, or at least one recognized by law; (2) he must be in actual possession thereof; and (3) his holding must be under color of title or authority."

It is readily apparent that those serving on the Authority satisfied the three requirements.

With respect to the validity of the acts of de facto officers, we have previously advised in Opinion of the Attorney General No. 75-9, dated February 3, 1975, that:

"Acts taken by 'de facto' officers are not to be treated differently than acts of 'de jure' or legal and qualified officers in so far as the public and third persons are concerned. Nofire v. United States, 164 U.S. 657, 661, 17 S. Ct. 212, 41 L.Ed 588 (1897). The law validates their acts in order to prevent a failure of public justice during their term. Bull v. Southwick, 2 N.M. 321 (1882); Grappert v. Bormer, 78 N.D. 760, 51 N.W.2d 866, 871 (1952); Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952); Forwood v. Taylor, 209 S.W.2d 434 (Tex. Civ. App. 1948); State v. London, 194 Wash. 458, 78 P.2d 548 (1938."

We adopt this position and acknowledge the validity of the actions of the Authority with the caution that the Authority should not take any further action until the bonding is complete. We make this distinction in part on the ground that prior to this opinion, Section 13-19-4(B), **supra,** was unclear with respect to the requirement of bonding, and having now clarified the legislative intent, there can be no excuse for failing to meet the requirements.

*{*150}* 4. As the actions of the Authority are not to be deemed invalid, there is no need to consider a procedure for revalidating them.

By: Jill Cooper

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