Opinion No. 24-3752

February 2, 1924

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. R. H. Carter, State Comptroller, Santa Fe, New Mexico.

Surety Companies Should Consent to Reduction in the Bonds of County Treasurers Even Though the Bonds in Greater Amounts Were Written Prior to the Time the Legislature Authorized Reduction.

An Official Bond is not Restricted to Duties Prescribed by Law at the Time But Embraces Additional Duties of the Office Imposed by the Legislature Thereafter.

OPINION

*{*122}* This inquiry arises upon the following facts:

The State Comptroller, upon the advice of this office, has notified the Boards of County Commissioners of the first class counties that the bonds of the various county treasurers should be reduced to $ 100,000.00 in compliance with the provisions of Sec. 16 of Chap. 76, Laws 1923, known as the Public Monies Act which became a law on March 9, 1923. In the first class counties the bonds given by the treasurers on Jan. 1, 1923 under the old law are all largely in excess of $ 100,000.00 and the counties are paying surety company premiums on such amounts. It was suggested by the Comptroller that the old bonds be retired and new ones in the sum of $ 100,000.00 be substituted. One of the surety companies, through the State Comptroller, has asked this office to specify the reasoning by which we arrive at the conclusion that this provision of the Public Monies Act reducing treasurers' bonds to $ 100,000.00 can be made to apply to the treasurers whose bonds were already written at the time the Act went into effect.

The question presented is a novel and difficult one. This office has never considered the matter from a legal standpoint, but advised the State Comptroller to suggest the replacement on the assumption that the various surety companies would see no objection to making the change; but since the legality of the plan is questioned, it becomes necessary for us to inquire into the matter somewhat closely.

The question is a complicated one and presents many difficult angles on which there is little or no law to be found. This is partially accounted for by the comparatively recent advent of paid surety companies in the field of suretyship, and many questions growing out of this new business have not been settled by the courts. The bond of a county treasurer to the State of New Mexico is doubtless a contract, but it involves three parties instead of two. Ordinarily an official bond is primarily a contract between the officer and the state, and it has been many times held that this contract is subject to great modification on the part of the state acting under its police power without causing an

impairment of the contract, such as is forbidden by the Constitution of the United States and of the State. Thus, it has been held that the Legislature may impose new duties upon an officer and the surety upon his official bond may be held responsible for the performance of his new duties. A bond conditioned for the discharge of the duties of an office should be understood not as restricted to duties as then prescribed by law, but as embracing the duties of the office as from time to time fixed and regulated by the Legislature.

*{*123}* "Accordingly, it has been held that the sureties of an officer are liable for monies received by him under an act passed subsequently to the execution of their bond." -- 22 R. C. L. 504.

Apparently the courts in dealing with official bonds have taken the position that modifications may be made in the contract without running afoul of the constitutional prohibition against the impairment of contracts, and apparently the courts also have not applied the familiar rule that a change in the contract which the surety guarantees will discharge the surety.

These principles are not directly in point but are helpful in arriving at a solution of the question asked. As between the treasurer and the state, it seems quite clear that the contract may be modified by the Legislature. The difficulty in this situation arises from the fact that it is claimed there is also a contract between the treasurer and the surety company whereby the surety company writes a bond for a specified premium and the question is raised whether the Legislature, after the making of this contract, can reduce the amount of the bond and consequently the amount of the premium to the surety company. It is suggested that such legislation is an attempted impairment of the contract between the treasurer and the surety company which takes away the right of the surety company to collect a certain agreed premium.

It might well be argued that the surety company writes the bond with a knowledge of the continued power of the Legislature to change the duties of the officer. This seems to be a general principle enunciated universally in connection with official bonds, and we think it might reasonably be said that although the surety company wrote a bond for an officer whose duty it was to furnish a bond in the amount of $ 300,000.00, yet it wrote the bond with the knowledge of the power of the Legislature to change this duty of the officer to furnish a bond in such amount, and with the knowledge that the Legislature might change the duty of the officer by requiring him to furnish bond in a lesser amount. I do not know that this rule would be applied, but I think it quite likely.

Another complication occurs to me in this connection. One surety company doing business in this state has already contended in one court that its liability on a depository bond is only 90 per cent of the bond and not the face of the bond because, according to its contention, the 90 per cent deposit statute of the state is a part of its contract, the same as if written into the bond. It occurs to me that some surety company, in case of a demand on a treasurer's bond amounting to more than $ 100,000.00, might assert some such defense; that although the face of the bond was $ 300,000.00, yet the limit of its

liability was only $ 100,000.00, which is the limit fixed by the statute under discussion. I do not believe such a defense could be successfully maintained because the law is quite clear that bonds given in excess of statutory requirements are binding for the full amount of the face of the bond. However, it seems to me that the surety company should make some declaration of its idea on this point.

It is of course clearly the intention of the Legislature in passing the Public Monies Act to work an instant reduction in the amount of the bond to be furnished by treasurers of counties of the first class and I know of nothing to interfere with the consummation of such intention except the constitutional prohibition against *{*124}* the impairment of contracts. In view of the principles above recited. I am inclined to think that this reduction would not be held to be an impairment of a contract. Although there is room for argument, I am inclined to think the courts would apply the principle that the liability of the surety company is unaffected by modifications of the duties of the officer and that the bond is written subject to possible, reasonable changes. If surety companies will not consent to a replacement of these treasurer's bonds, a claim for refund of premiums collected under an excessive bond will doubtless accrue to the county and state.

Another complication is the possibility that the counties cannot legally pay a premium on behalf of the treasurer in excess of a premium on $ 100,000.00 and if the suggestion of the surety company is sound, then the treasurers would be liable individually for the amount of the premium in excess of the premium on $ 100,000. These observations are written on the assumption that there is no right on the part of the treasurer to cancel his bond.

It is hoped that this matter can be handled amicably. It has been suggested that if the companies are forced to cancel the present bonds, they will refuse to write new bonds in a lesser amount, but I am loath to believe that any such policy would be pursued. In suggesting the reduction of the bonds, I had no idea that it would not be agreeable to the surety companies. It seems to me that the replacement should be made at once by the voluntary act of the surety companies and the matter closed.