

BONDS:

No statutory authority for ~~employees~~ ^{any employee}
of Division of Welfare to execute
surety bonds. ^{except director}

DIVISION OF WELFARE:

November 13, 1950

11/15/30

Mr. Proctor N. Carter, Director
Division of Welfare
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

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Dear Sir:

This will acknowledge receipt of your request to approve the enclosed \$1,000.00 surety bond wherein Thomas J. Barker, employee, Division of Welfare, is principal, and the Massachusetts Bonding and Insurance Company, the insurer, made payable to the Department of Public Health and Welfare, Division of Welfare, State of Missouri.

Heretofore similar surety bonds have received the approval of this department; however, that was prior to the enactment of two recent revision bills by the General Assembly of the State of Missouri, namely, Senate Revision Bill No. 1050 and Senate Revision Bill No. 1062.

Prior to the enactment of the foregoing revision bills, Section 9400, R. S. Mo. 1939, was still effective. That section reads:

"The Governor, by and with the advice and consent of the Senate, shall appoint a State Administrator at an annual salary of not to exceed \$6,000.00 who shall be a person qualified by education and experience to supervise the administration of the work of the State Social Security Commission, and shall have been a citizen and taxpayer of Missouri for not less than ten years and shall hold office for a term of four years. The State Administrator shall, with the consent of the State Commission, appoint such officers, employees, and others as may be required herein for the administration of any law imposing duties upon the State Commission or deemed necessary by the State Commission, and shall fix their duties, title, expenses and compensation within the

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limits of Appropriation laws. The State Administrator shall serve as executive and administrative officer of the State Commission. He shall prepare and submit to the State Commission, for its approval, an annual budget of all funds necessary to be expended by the State Commission. He shall prepare annually a full report of the administration of this or any other law, together with such recommendations and suggestions as he may deem advisable, and submit such report to the Governor. Each officer or appointee may be removed at any time by the appointing power in the same manner by which the appointment is required by law to be made. Members of the State Commission, the State Administrator and all officers appointed by the State Commission shall, before entering upon the duties of their office, take and subscribe an oath or affirmation, as required by the Constitution of Missouri. The State Commission may require a good and sufficient bond to be given by any officer or employee as the State Commission may designate in an amount and with sureties satisfactory to the State Commission, and in a form of bond approved by the Attorney General, conditioned upon the faithful discharge of the duties of the respective office or employment, and to account for all property and funds coming into their hands by, through and from such office or employment."

The foregoing provision vested in the Social Security Commission authority to bond employees and officers. Subsequent thereto, the 63rd General Assembly, in creating the Department of Public Health and Welfare, and particularly the Division of Welfare thereunder, vested in that body all the authority heretofore vested in the Social Security Commission, which had the effect of automatically transferring the power under Section 9400, supra, from the Social Security Commission to its successor in office, the Division of Welfare. However, subsequent thereto, the 65th General Assembly enacted Senate Revision Bill No. 1050, Section 191.01 specifically repealing Sections 1 and 7, page 945, Laws of Missouri, 1945 (known as Sections 9759.1 and 9759.7, Mo. R.S.A.), and also said General Assembly enacted Senate Revision Bill No. 1062, Section 207.1

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specifically repealing Sections 9759.31 and 9759.32, Mo. R.S.A., and Section 9400, R. S. Mo. 1939, without enacting in lieu thereof any provision for bonding employees and officers employed or appointed in said Division of Welfare. So, under the law presently in full force and effect in this state, there is no statute requiring such employees and officials in said Division to execute surety bonds to the Department of Public Health and Welfare, Division of Welfare. Undoubtedly this was an oversight on the part of the Legislature in enacting said revision bills.

There are some instances when certain employees or officers are required by law to execute surety bonds to the state, county or some political subdivision thereof and when there is no provision for the payment of the premium on said bond, that becomes an obligation of said employee or officer. In such case that is in the nature of a prerequisite to said employment or appointment. In *Berry v. Linn County*, 195 S.W. (2d) 502, 1.c. 503, the court said:

"The intent of Section 3238 is clear. It provides when an officer chooses to give a surety company bond, the cost of it shall not be imposed on the county unless the county agrees.

* * * * *

"The same contention *Berry* makes here has been previously presented to and denied by this court. *Cox v. Polk County*, Mo. Sup., 173 S.W. 2d 680, and *Motley v. Callaway County*, 347 Mo. 1018, 149 S.W. 2d 875. The latter case held that Section 3238 merely authorizes a county to make an agreement for a surety company bond and, if it does so in advance, to pay the cost of the bond when it is furnished."

Volume 46 C.J., Section 388, page 1063, lays down the general principle of law relative to requiring surety bonds of public officials and reads in part:

"Where an official bond is required of an officer without statutory requirement therefor, it is without legal effect except where the officer secures some direct pecuniary advantage, or it is otherwise sustained by a sufficient consideration. But it is held that a bond voluntarily given, although not

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required by statute, may be binding upon the parties where intended to serve a lawful purpose and not against public policy; and a public officer may give a particular security, not required by law, to parties whose interests are intrusted into his hands, for the faithful discharge of his duties toward them, which may be enforced as a common-law obligation."

Also in *Burton Machine Co. v. Ruth*, 196 Mo. App. 459, l.c. 465, 466, the court, in holding that a bond not authorized by statute if voluntarily given may be valid if it does not contravene public policy, said:

"A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute. (*Barnes v. Webster*, 16 Mo. 258.) And it is a well settled rule that a bond taken by a public officer in attempted compliance with a statute is good as a common law bond though it falls short of fulfilling the requirements of the statute." (*Lumber Co. v. Schwartz*, 163 Mo. App. 659, 664, 147 S.W. 501; *Lumber Co. v. Banks*, 136 Mo. App. 44, 117 S.W. 611; *Fellows v. Kreutz*, 189 Mo. App. 547, 176 S.W. 1080; *Uhrich v. Globe Surety Co. of Kansas City*, 191 Mo. App. 111, 166 S.W. 845.)"

However, we definitely do not have any statute requiring the execution of such a surety bond by said employees of the Division of Welfare. This is not a case of a statutory provision requiring a bond and an attempt being made to comply with such statute. Furthermore, there is absolutely no method by which the Department of Public Health and Welfare, Division of Welfare, can legally pay the premium on such surety bonds in the absence of statutory authority requiring the payment of premiums on such bonds and in the absence of any statute requiring such bonds to be executed. Section 28, Article IV, Constitution of Missouri, 1945, is a prohibition against the payment of such premiums by the Division of Welfare. Said section reads:

"No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made

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by law, nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and the state auditor certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. At the time of issuance each such certification shall be entered on the general accounting books as an encumbrance on the appropriation. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates, and every appropriation shall expire six months after the end of the period for which made."

Presently the only person employed by the Division of Welfare required to execute a surety bond is the Director of Welfare. Section 34, page 955, Laws of Missouri, 1945, Section 9759.34, Mo. R.S.A., provides that he shall enter into a good and sufficient bond payable to the State of Missouri for the faithful performance of his official duties and to account for all property and funds coming under his administration and control, said bond to be approved by the Attorney General and the premium on said bond to be paid by the State of Missouri.

CONCLUSION

It is the opinion of this department that the enclosed surety bond is not required under the laws of the State of Missouri, and, therefore, we cannot approve same; that presently the only statutory requirement for any employee or official of the Division of Welfare to execute a surety bond to the State of Missouri is the Director of Welfare. Before employees and officers of the Division of Welfare can be bonded by the State of Missouri, it will be necessary that the General Assembly of the State enact a law requiring such persons to execute bonds, and for the State to pay the premiums on said bonds, the law must specifically provide for payment of the premiums by the State.

Respectfully submitted,

APPROVED:



J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:VLM
Enc.