

Ohio, acting by the Department of Public Works, for C. N. and I. Department, Wilberforce University, Wilberforce, Ohio, for the construction and completion of Contract for Power Plant Equipment for a project known as Revised January 27, 1938, Power Plant Equipment, C. N. & I. Department, Wilberforce University, Wilberforce, Ohio, as set forth in the Form of Proposal dated February 26, 1938, which contract calls for the total expenditure of eighteen thousand six hundred and ninety four dollars (\$18,694.00).

You have also submitted the following papers and documents in this connection: Incumbrance estimate No. 2, dated March 24, 1938, the estimate of cost, the division of contract, the notice to bidders, the proof of publication, workmen's compensation certificate showing the contractor having complied with the laws of Ohio relating to compensation, the form of proposal containing the contract bond signed by the Hartford Accident and Indemnity Company, its power of attorney for the signer, its financial statement and its certificate of compliance with the laws of Ohio relating to surety companies, the recommendations of the State Architect and Engineer, Board of Trustees and Director of Public Works, letter of certification from the Auditor of State showing that the necessary papers and documents are on file in said office, Controlling Board release, and the tabulation of bids received on this project.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other documents submitted in this connection.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2273.

MEMBER BOARD OF EDUCATION—WHERE HE SERVES AS DIRECTOR OF BANK WHICH IS DEPOSITORY FOR INACTIVE SCHOOL FUNDS—DOES NOT VIOLATE SECTION 4757 G. C.—UNIFORM DEPOSITORY ACT REQUIRES ADVERTISING AND COMPETITIVE BIDDING FOR INACTIVE FUNDS—SEE O. A. G. 1933, PAGE 1785—WHEN HE SERVES WHERE BANK IS DEPOSITORY OF ACTIVE SCHOOL FUNDS, VIOLATION OF SAID SECTION.

SYLLABUS:

1. *A member of a board of education who serves as director of a bank which is a depository for inactive school funds does not, in so doing, violate Section 4757, General Code, since the Uniform Depository Act*

provides for advertisement and competitive bidding in the making of contracts for inactive funds. (Opinions of the Attorney General for 1933, Volume III, page 1785 followed.)

2. *A member of a board of education who serves as director of a bank which is a depository for active school funds violates the provisions of Section 4757, General Code, since the Uniform Depository Act does not require advertisement or competitive bidding for such contracts.*

COLUMBUS, OHIO, April 11, 1938.

HON. THEODORE TILDEN, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: This will acknowledge the receipt of your recent letter requesting an opinion. The facts given by you are as follows:

"In one of our school districts we have two members of a school board who are also directors of a bank which is the depository of the funds of the school district. The school board intends soon to enact legislation for a bond issue and they want to know if the two mentioned board members are disqualified because they are directors of the depository bank.

The two members are willing to resign if their position as school board members will jeopardize the legality of the proceedings and of the bonds. It appears that an examiner has ruled that the two offices are incompatible."

The situation described does not involve incompatibility of offices. It does, however, present a question as to whether or not the school board members who serve as directors of banks which are depositories of school funds violate provisions of Section 4757, General Code, in so doing.

Section 4757, General Code, imposes certain restrictions upon members of boards of education as follows:

"Conveyances made by a board of education shall be executed by the president and clerk thereof. No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member except as clerk or treasurer. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board."

In an Opinion of the Attorney General for 1933, Vol. III, page 1785, application of Section 4757, supra, was made to a case involving circumstances very similar to those before us. The syllabi of that opinion reads:

"1. Boards of County Commissioners, boards of township trustees and boards of education, authorized by statute to create depositories only by competitive bidding, may legally enter into a depository contract with a bank having as stockholders and directors one or more members of the board of the contracting political subdivision.

2. The board of education of a school district containing less than two banks is prohibited by Section 4757, General Code, from entering into depository contract with a bank of which one or more members of the board are stockholders, and directors, since Section 7607, General Code, authorizing the creation of such depository, does not provide for competitive bidding."

The ruling of this opinion has been followed by many authorities and it is now well established that only in cases where public contracts are made after advertisement and competitive bidding, will they be treated as exceptions to the laws prohibiting interest of public officers in public contracts. (See O. A. G., 1937, No. 1649).

Since the 1933 opinion, however, there has been a change in the law regulating depository contracts. The new Uniform Depository Act (Section 2296-1 et sec.) makes separate provisions for the placing of active funds and inactive funds. In the case of inactive funds, advertisement and competitive bidding is still provided for. However, in the case of active funds, no advertisement or bidding is required and this being the case such contracts come clearly and strictly within the statutes prohibiting interest of public officials in public contracts.

Certainly the wording of Section 4757, *supra*, is clear and definite enough in providing that "no member of the board shall have directly or indirectly any pecuniary interest in any contract of the board * * *." This being the case, I am unable to see how we can avoid the fact that the school board member who is also director of a bank which serves as a depository for school funds has at least an indirect pecuniary interest if not a direct one, and that such interest expressly violates the statute.

We come now to the question as to whether or not a violation of Section 4757, General Code, will affect the legality of board proceedings where an offending member of the school board participates in the proceedings. Section 4757, *supra*, in prohibiting interest of school board members in school board contracts does not void the official acts of such members. It rather makes them subject to prosecution for violation of the law. We must therefore conclude that however illegal interest of a school board member may be in school contracts, that member is at least

a de facto officer and as such his official acts with other members of the board will stand.

It is therefore my opinion that his participation in proceedings before the school board would not make void any measures adopted by it.

Though your letter did not raise the question, this office has been frequently asked what should be done in certain districts where there is only one eligible bank in a district and officers of that bank happen to be members of the school board. The Uniform Depository Law does not require any bank to take public funds. It has, moreover, specifically provided for cases where there is no eligible bank or only one eligible bank in a district. (See Section 2296-6 G. C.) In such a case funds may be deposited in an eligible bank located in the county seat or in any bank conveniently located outside the district, qualified as the law provides to accept the same.

In specific answer to your inquiry it is therefore my opinion that:

1. A member of a board of education who serves as director of a bank which is depository for inactive school funds does not, in so doing, violate Section 4757, General Code, since the Uniform Depository Act provides for advertisement and competitive bidding in the making of contracts for inactive funds.

2. However, a member of a board of education who serves as director of a bank which is a depository for active school funds does violate the provisions of Section 4757, General Code, since the Uniform Depository Act does not require advertisement or competitive bidding for such contracts.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2274.

CELEBRATION—150TH ANNIVERSARY ADOPTION OF ORDINANCE 1787 AND SETTLEMENT NORTHWEST TERRITORY—BOARD OF COUNTY COMMISSIONERS—NO AUTHORITY TO APPROPRIATE COUNTY FUNDS TO PARTICIPATE—MUNICIPAL FUNDS DISTINGUISHED.

SYLLABUS:

A board of county commissioners is without authority to appropriate county funds for the purpose of participating in the Celebration of the