

974.

APPROVAL, BONDS OF VILLAGE OF DOVER, TUSCARAWAS COUNTY
—\$10,500.00.

COLUMBUS, OHIO, October 3, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

975.

COUNCILMAN—CITY—ACTING AS AGENT IN EXECUTION OF SURETY
BOND TO SECURE CONTRACT ENTERED INTO BY SAID CITY IL-
LEGAL.

SYLLABUS:

It is unlawful for a member of a city council who is also agent for a surety company, to execute bonds on behalf of such surety company to secure the performance of contracts entered into with the city upon whose council he serves.

COLUMBUS, OHIO, October 3, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 4207, G. C., prohibits a member of a city council from having any interest in any contract with the city.

Section 3808, G. C., prohibits any member of council from having any interest in the expenditure of money on the part of the corporation other than his fixed compensation.

In Opinion No. 3867, page 524, Opinions for the year 1926, at page 526, it is said:

‘As a member of the council is interested in the award of the contract by virtue of obtaining a commission for executing the surety bonds, it is believed that such a member would have an interest in the expenditure of money by the corporation.’

Question: May a member of a city council acting as agent for a company writing surety bonds for contractors, legally write such bonds for contractors doing work for the city of which the party in question is a member of council?”

The 1926 opinion to which you direct my attention, has reference to a member of a village council. It is pointed out in that opinion that a village council, as directed by Section 4221, General Code, authorizes the making of all contracts on behalf of the village and that such contracts are executed in the name of the village and signed by the mayor and clerk thereof. In fact, a village council acting in the capacity of an administrative board, after receiving bids, if the amount involved in the contract exceeds five hundred dollars, really lets the contract; and whether the amount involved in a contract exceeds five hundred dollars or not, the council determines to whom such contract shall be let. It is also stated in the aforesaid opinion that a bond

given to secure the faithful performance of such contract is really a part of the contract, and it is necessary for council to pass on the sufficiency of the bond thus putting it within the power of a village council to reject the contract by reason of an insufficient bond. For that reason, it is stated that :

“As a member of the council is interested in the award of the contract by virtue of obtaining a commission for executing the surety bonds, it is believed that such a member would have an interest in the expenditure of money by the corporation.”

A similar holding was made by my immediate predecessor in an opinion reported in Opinions of the Attorney General for 1927, at page 1513, where it was held :

“A member of a village council during his term of office cannot legally sell lumber to a contractor for use in connection with a contract awarded to such contractor by the council of which the party in question is a member.”

In another opinion, Opinions of the Attorney General for 1927, at page 1561, it is held :

“For the mayor of the village to act as agent for a surety company, and execute bidding or construction bonds required to be given by contractors when making contracts with the village, for which service he receives a commission from the surety company, is a violation of Section 3808, General Code, and subjects the mayor to the penalties imposed by the statute.”

In the last mentioned opinion, while in effect it is held that the mayor has such an interest in the expenditure of money on the part of the village as to bring the making of such a contract within the prohibition contained in Section 3808, General Code, the holding is not entirely based on that fact, but to some extent on the proposition that for the mayor of a village, who is by statute constituted the chief executive head of the village, to be interested in the making of a contract, even to so small an extent as the receiving of a commission for the execution of a surety bond to secure the contract, is inconsistent with his duties as mayor. To some extent, the other opinions mentioned are based on similar considerations, although they each hold that the receiving of a commission on a surety bond executed by a surety company to secure the performance of a village contract constitutes in the person receiving such commission an interest in the contract such as is described in Section 3808, General Code.

In the last mentioned opinion above referred to the holding is explained and somewhat qualified by the following language :

“Likewise it could not be said that in all cases merely because the agent of the surety company furnishing bonds to contractors was an officer of the corporation such fact would taint the contract with illegality and thereby make it void, but because of a village mayor's relation to the council which makes the contract and because of his position in the village government and his relation to the public whose interest it is to have due and proper execution of all contracts made with the village, it would open the door to collusion and fraud to permit such mayor to have the interest which he would have necessarily in contracts for which he had furnished the bond.

Public offices are public trusts and a mayor with that high sense of duty which a public officer should have would not place himself in such a position

that his conduct might be questioned and subject himself to cause for suspicion even though he might act with honest intent."

City councils are not clothed with the same functions as are village councils. They do not act as a board, in the letting of contracts or the making of purchases for the city, and the members of a city council cannot be said to bear the same relation to contracts for improvements and purchases of supplies for the city as do members of a village council to similar contracts and purchases for the village. However, members of a city council are officers of the city, and if the receiving of a commission by a member of a city council for the execution of a surety bond to secure the performance of contracts made by the municipality, even though made by other agents of the municipality, creates in the councilman an interest in such contracts, or an interest in the expenditure of money by the municipality, the transaction is within both the letter and the spirit of the inhibition on the making of such contracts contained in Section 3808 and cognate sections of the General Code.

It is doubtful, in view of the language of the Supreme Court in the recent case of *Wright vs. Clark*, 119 O. S., 462, whether it is necessary, in order to render contracts void, that their inhibition come within the strict letter of the statutes prohibiting public officials from being interested in contracts made for and on behalf of the political subdivision with which they are connected. In the *Wright* case, *supra*, Chief Justice Marshall, in commenting on the provisions of Section 3808, General Code, used the following significant language:

"It was the purpose of the Legislature in that enactment to reach all persons holding positions in a city or village government who are charged with official responsibility in conducting an economic administration of corporate affairs, and to prohibit them from having any interest in the expenditure of corporate funds. We must therefore look to the spirit as well as the letter of that statute."

It must be acknowledged that statutes such as Sections 4207 and 3808, General Code, are in their nature penal, and are as a general proposition to be construed strictly, yet it also is a rule of statutory construction not to be lost sight of in construing these and similar statutes enacted to prevent fraud, that they are not to be construed so as to encourage, but to prevent the evil aimed at. Another well settled rule of statutory construction, equally applicable, is that statutes declaratory of the common law are to be liberally construed to effectuate the purpose of their enactment.

The principle involved in the inhibition against a public officer having an interest in a contract made in behalf of the political subdivision to which he sustains the relation of an officer is founded on public policy and is an inheritance from the common law. Such statutes as Sections 3808 and 4207, General Code, are declaratory of the common law.

The principle is evolved from the self-evident truth that no person can at one and the same time serve two masters representing diverse and inconsistent interests with respect to the services to be performed. This principle has always been one of the essential attributes of any rational system of positive law, even reaching private contractual relations where there are created between individuals trust or fiduciary relations.

It is a doctrine of our law, as old as the principles of equity, that an agent in the execution of his agency, shall not be permitted to put himself in a position antagonistic to his principal. An agent, by accepting the undertaking committed to his care, impliedly agrees that he will use his best endeavors to further the interest of his principal. This principle of law precludes him absolutely from dealing with himself,

either directly or indirectly. Public policy requires, and the law upon that subject, as I say, is as old as courts of equity, that the agent shall not deal with or for himself directly or indirectly, and all such contracts made by an agent are voidable as against his principal. This salutary principle of the law applies as well to public as to private agents, and public officials, who are the agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests which are represented and which it is their duty to protect. Mechem, Public Officers, Section 840.

As agent of a surety company which executes bonds to secure contracts let by a city, a councilman in said city, could not help but be interested in any forfeitures of such bonds, and in the carrying out of the contracts so that there would be no liability on the bond. If defaults occur on the part of the contractors whose contracts are secured by bonds executed by a councilman as agent of a surety company, the councilman surely is interested in the liability under the bond and in any settlement of such liability. This must necessarily be so, else he does not faithfully represent his principal, the surety company. In such a situation, a councilman would find himself representing two masters whose interests were antagonistic, and in direct conflict. Again, if it should become necessary to enforce liability on any such bonds by action in court, the city council is clothed with sufficient powers with respect thereto as would cause a member of such council to have conflicting obligations.

Sections 4240 and 4308, General Code, provide as follows:

Sec. 4240. "The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

Sec. 4308. "When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action."

For the reasons hereinbefore discussed, I am of the opinion, in specific answer to your question, that it is unlawful for a member of a city council who is also agent for a surety company, to execute bonds on behalf of such surety company to secure the performance of contracts entered into with the city upon whose council he serves.

Respectfully,

GILBERT BETTMAN,
Attorney General.

976.

SCHOOL DISTRICT—TRANSFER OF TERRITORY FROM RURAL TO CITY—ACCEPTANCE BY LATTER DISCRETIONARY.

SYLLABUS:

It is discretionary with a city board of education whether or not it will accept the transfer of the territory of a contiguous rural school district made to it by the county board of education.