

OPINION NO. 66-162**Syllabus:**

1. No member or employee of a metropolitan housing authority shall have any interest, directly or indirectly, in any contract for property, materials, or services to be acquired by such authority, regardless of when such contract was entered into. Such member or employee may not receive any moneys under such a contract. Opinion No. 3845, Opinions of the Attorney General for 1931, approved.

2. No officer of a municipal corporation, whether a charter municipality or not, shall have any interest other than his fixed compensation, in the expenditure of money on the part of such municipal corporation, regardless of whether such expenditure derives from a contract made by the person with the municipality before he became an officer. Such officer may not receive any moneys under such contract. Opinion No. 812, Opinions of the Attorney General for 1951, overruled in part.

3. The exception in Section 2919.09, Revised Code, relating to advertising for bids, has no application to the two questions herein answered.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, September 23, 1966

Your request for my opinion informs me of the following situations:

A person contracted with the Metropolitan Housing Authority to modernize one of the housing projects. Later, while in the process of performing the services under the contract, he was employed by the authority as an inspector.

A person entered into a contract with a municipality to furnish its insurance needs for five years. Within the five year period he was appointed an official of that municipality.

Your request concludes:

"As the concept of conflict of interest continually crops up in our work and is of great importance in safeguarding the public interest, we feel the necessity of and respectfully ask for your consideration and opinion on the following questions:

"1) Where a contract is entered into between a person and a Metropolitan Housing

Authority prior to the time that he becomes employed by the Authority, does O.R.C. 3735.29 prohibit him from receiving money due him under the contract?

"2) Where a contract is entered into between a person and a Municipal Corporation prior to the time that he becomes employed by the Municipality, does O.R.C. 733.78 prohibit him from receiving money due him under the contract?

"3) Would the fact that a charter municipality was involved change your answer to question No. 2?

"4) Would the fact that the contract was entered into after advertising for bids and upon determination of the proper authorities change any of your answers to questions No. 1, 2 or 3?"

Section 3735.29, Revised Code, provides:

"No member or employee of a metropolitan housing authority shall have any interest, directly or indirectly, in any contract for property, materials, or services to be acquired by said authority."

(Emphasis added)

This section leads to the inescapable conclusion that no employee of a metropolitan housing authority may have any interest in a contract for services to be performed for the authority. Since the statute is silent as to the time of making the contract, and since the prohibition is a blanket prohibition, a contract made by a person

with the housing authority before he became an employee of such authority, which contract is to be performed while the person is an employee is prohibited.

In construing a similar statute a predecessor of mine in Opinion No. 3845, Opinions of the Attorney General for 1931, Volume III, page 1498 stated at page 1499:

"By reason of the plain terms of the above section, it is evident that no member of a board of education shall have a pecuniary interest in a contract such as you describe, during the time he is a member of said board. In some instances statutes prohibit the making of a contract by public officers during the term of office and for a designated period thereafter, but the statute under consideration states in positive language that no member of the board shall have an interest in any contract of the board. It follows that Mr. B cannot qualify for the office unless he renounces his rights under the contract."

(Emphasis added)

Mr. B had made a contract to transport pupils to school prior to his being elected a member of the school board. The statute then in effect was Section 4757, General Code, which read in part:

"* * * 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. * * *"

The prohibitory language of Section 3735.29, *supra*, is virtually the same as Section 4757, *supra*. It follows that an employee of a metropolitan housing authority legally cannot have any interest in a contract for modernization with such authority.

Furthermore, criminal sanctions exist for an officer or agent having an interest in contracts. Section 2919.08, Revised Code, provides:

"No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected."

"Whoever violates this section shall be imprisoned not less than one nor more than ten years."

(Emphasis added)

It would seem that the person in question is providing property and services for the use of a public institution, the housing authority, by modernizing one of the housing projects. Certainly, the person in question is "interested" in the contract.

The court in In re Leach, 19 O.O. 263 (Com. Pl. 1940), had occasion to consider this section (2919.08, supra) in regard to removing a member of a board of education from office for misconduct in office. In judging the member guilty of malfeasance, the court stated at page 268:

"* * * Also, if the contract is already in existence and a stockholder or member of the firm having the contract is elected a member of the board, he cannot legally qualify; and by Section 12910, General Code [Section 2919.08, supra,] if an officer has an interest in a contract such action on the part of the officer is constituted a crime.

* * *

(Emphasis added)

You also ask about an "official" of a municipality who had made a contract with the municipality. Section 733.78, Revised Code, provides:

"No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation. Any person who violates this section shall be disqualified from holding any office of trust or profit in the municipal corporation, and shall be liable to the municipal corporation for all sums of money or other things received by him, in violation of this section, and if in office he shall be dismissed therefrom.

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(Emphasis added)

The reasoning applied to the employee of the housing authority also is applicable to an officer of a municipality. I assume that the "official" of your request is an "officer" as contemplated by Section 733.78, supra.

"Any interest" is broad in its sweeping prohibition. It is precisely a situation such as is posed in your request that the legislature intends to prevent. A public officer must be beyond temptation; he should not be in a position to profit from his public office.

There is no exemption or exception from this explicit prohibition because of good faith or knowledge, or lack of it, of the official, and none can reasonably be implied in face of the plain language of such prohibition. One of my

predecessors in office had occasion to consider a similar matter in Opinion No. 812, Opinions of the Attorney General for 1951, page 589. That opinion considered Section 3808, General Code, (now Section 733.78, Revised Code), which provided in part an exception to the prohibition against an officer of a municipal corporation having an interest in a contract with said municipal corporation, if such officer was merely a shareholder of a private corporation without being a director or officer thereof, owning not more than five percent of the stock of such private corporation. Even under such circumstances my predecessor held that when such exception was not properly invoked, a contract made between the municipal corporation and the private corporation in which the officer is a stockholder was "illegal and invalid and the city auditor is justified in withholding payments under such contract." The third branch of the syllabus of such opinion held, such officer should refund to the municipality any profit which came to him by reason of such contract, and such amount may be recovered from such officer, whether or not he had knowledge of the making of such contract.

Furthermore, there is a criminal statute especially directed toward municipal officers having an interest in contracts. Section 2919.10, Revised Code, provides:

"No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall be interested in the profits of a contract, job, work, or services for such municipal corporation or township, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employee of the contractor of such contract, job, work, or services while in office.

"Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both."
(Emphasis added)

The term "interested" is used in a broad, prohibitory sense. The language "during the term for which he was elected or appointed" makes it certain that a contract made before a person became an officer and to be performed while he is an officer is forbidden.

A predecessor of mine ruled otherwise in Opinion No. 2597, Opinions of the Attorney General for 1938, Volume II, page 1204.

However, this opinion was based upon a different factual situation, the officer involved was a township trustee and the contract he made was with the county commissioners, not

his own township, and the prohibition against his interest was contained in Section 12911, General Code, (now Section 2919.09, Revised Code), and the ruling was directly contrary to the plain statutory prohibition. It is for the General Assembly to legislate, not the Attorney General. Therefore, this opinion, so far as it applies to the facts in this case, is overruled.

In Opinion No. 2065, Opinions of the Attorney General for 1961, page 128, my immediate predecessor, in construing Section 2919.10, Revised Code, supra, as it applied to a person who had formerly been a Township Trustee, held that the provision of said section relating to "one year thereafter," supra, did not preclude the succeeding board of township trustees from making a contract with the then employer of the former trustee. Such holding is not necessary to the conclusion herein, but the first branch of the syllabus in such previous Opinion contains the statement, "The provision of Section 2919.10, Revised Code, that no member of a board of township trustees shall be interested in the profits of a contract, job, work, or services for the township applies only to a person who is actually serving on the board at the time the contract, job, work, or services is entered into; * * *", which is not supported by any authority in the Opinion, except a discussion on semantics and the presence or absence of a comma. In face of the plain statutory prohibition and the lack of other authority given, I find it necessary to overrule that portion of branch No. 1 of the syllabus, as hereinabove quoted, as it applies to an official of a municipality being interested in a contract with such municipality.

No change from the foregoing conclusions is required because a charter municipality is involved. Among other sections, Section 3, Article XVIII, Ohio Constitution, provides that a municipality may have home rule. However, by that same section police regulations may not be "in conflict with general laws". Sections 733.78, 2919.08, and 2919.10, supra, are such general laws which prevent a municipality from enacting municipal legislation which would be in conflict with these statutes.

Advertising for bids would not change my answer to your questions. Although Section 2919.09, Revised Code, has an exception for competitive bidding, that section is directed toward public offices and employees contracting, etc., with public bodies other than those of which they are officers or employees. The fact that the competitive bidding exception is part of one section is a further argument that for Sections 2919.08 and 2919.10, supra, competitive bidding is immaterial.

Four sections, all imposing criminal sanctions against officers and employees who have an "interest" in public contracts, have been enacted, and re-enacted by the legislature over a period of many years, indicating a strong legislative intent to establish the public policy that such contracts are void, and our courts have sustained this policy.

Since contracts such as you contemplate are thus contrary to statute law and public policy, there can be no receipt of moneys by such officer or employee. If this opinion seem harsh, it must be borne in mind that no one need become a public officer or employee, and those who do are bound by the laws applicable thereto.

Accordingly, it is my opinion and you are advised that:

1. No member or employee of a metropolitan housing authority shall have any interest, directly or indirectly, in any contract for property, materials, or services to be acquired by such authority, regardless of when such contract was entered into. Such member or employee may not receive any moneys under such a contract. Opinion No. 3845, Opinions of the Attorney General for 1931, approved.

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