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1. HOSPITAL—COUNTY—MEMBER, BOARD OF TRUSTEES—SECTION 3136 G. C.—INCUMBENT OF AN OFFICE OF TRUST OR PROFIT—SECTIONS 12910, 12911 G. C.
2. SECTIONS 12910, 12911 G. C. CONSTITUTE PENAL LEGISLATION—MUST BE STRICTLY CONSTRUED AGAINST STATE.
3. ENUMERATION OF PARTICULAR CONTRACTS IN WHICH PUBLIC OFFICER IS FORBIDDEN TO BE INTERESTED—INCLUDES FIRE INSURANCE CONTRACTS—EFFECT—TO EXCLUDE CONTRACTS OF INSURANCE OTHER THAN FIRE.
4. SECTION 12911 G. C. IS NOT, BY ITS OWN TERMS, APPLICABLE TO CONTRACTS WHERE AMOUNT IS FIFTY DOLLARS OR LESS—AMOUNT INVOLVED IN FIRE INSURANCE CONTRACT—MEASURED BY AMOUNT OF PREMIUM PAYABLE.
5. EFFECT OF SECTION 12911 G. C. AS TO TRUSTEE OF COUNTY HOSPITAL—APPOINTED UNDER PROVISIONS OF SECTION 3136 G. C.—INTEREST IN CONTRACT—FIRE INSURANCE—BIDS—DULY ADVERTISED—ADVERTISING NOT REQUIRED BY LAW.

## SYLLABUS:

1. A member of the board of trustees of a county hospital appointed pursuant to the provisions of Section 3136, General Code, is the incumbent of an office of trust or profit within the meaning of Sections 12910 and 12911, General Code.

2. Sections 12910 and 12911, General Code, constitute penal legislation and must be strictly construed against the state.

3. The enumeration in Sections 12910 and 12911, General Code, of the particular contracts in which a public officer is forbidden to be interested, which enumeration includes "fire insurance" contracts, has the effect of excluding from the application of these sections contracts for insurance other than fire insurance.

4. Section 12911, General Code, is not, by its own terms, applicable to contracts where the amount involved is fifty dollars or less; and the "amount" involved in a fire insurance contract is measured by the amount of the premium payable thereon.

5. Section 12911, General Code, does not forbid a trustee of a county hospital appointed under the provisions of Section 3136, General Code, to have an interest in a contract for the purchase of fire insurance by a political subdivision or public institution with which he is not connected where the amount of the premium payable under such contract exceeds the sum of fifty dollars and where such contract is let pursuant to bids duly advertised as may now or hereafter be provided by law; but such interest is forbidden by this section where such contract is let on competitive bids after advertisement, where such advertising for bids is not required by law.

Columbus, Ohio, July 26, 1951

Hon. G. L. Schilling, Prosecuting Attorney  
Clinton County, Wilmington, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Under date of May 15, 1951, this office received from Mr. S. a letter in which he requested an opinion from my office, and his said letter reads as follows:

"It has come to my attention that a member of the Clinton Memorial Hospital Board may not be able to participate in the insurance business of the Hospital or any public insurance business of the county.

"Will you be kind enough to give me an opinion on this matter that is very important to me?"

"There is under construction in Clinton County, Ohio, pursuant to Section 3131 of the General Code of Ohio, a county hospital which same is being constructed from funds provided by a \$600,000 bond issue voted by the citizens of Clinton County, Ohio, and certain funds made available by the federal government for the building of hospitals. Pursuant to Section 3131 the Board of Trustees have been appointed to construct and equip said hospital. Their duties are fully set forth and defined in Section 3132 of the General Code. Mr. S. is not a member of such Board of Trustees.

"Pursuant to Section 3136 of the General Code of Ohio there has been appointed four trustees which we commonly designate as 'Operating Trustees' and Mr. S. is a member of such Board of Trustees.

"The specific question facing this office for an opinion is this. Can a member of the Board of Trustees to operate a county hospital, who is engaged in the insurance business, sell fire, wind and tornado insurance upon said hospital building and its contents, and can such Trustee write liability insurance? And further, can such Trustee sell to the county general insurance upon any and all of the buildings that are owned and under the control of the Board of County Commissioners of a County?

"Section 2420 of the General Code of Ohio specifically provides that no member of the Board of County Commissioners shall have any interest whatsoever in any contract. Section 4834-6 of the General Code specifically provides that Boards of Education and members thereof, shall not be interested in any contract. Section 12910 of the General Code of Ohio seems to be rather broad in its scope and even goes so far as to hold that one holding an office of trust or profit by election or appointment is precluded from being interested in any contract for the purchase of property, supplies or fire insurance for the use of a county, township, city, village, Board of Education or public institution with which he is connected and if he acts otherwise he will be guilty of a felony.

"Section 12911 provides if the premium on the sale of fire insurance amounts to more than fifty dollars, unless such contract is let on bids duly advertised as provided by law, such one holding the office of trust or profit by election or appointment would be guilty of a felony.

"Section 12912 of the General Code of Ohio has application only to certain elected officials and no mention therein is made to any boards by appointment.

"Pursuant to Section 12910 and Section 12911, it would be the opinion of this office that Mr. S., as a member of the Operating Board of Trustees of Clinton Memorial Hospital, would be precluded not only from selling insurance upon said hospital or any other building owned by Clinton County and under the control and supervision of the Board of County Commissioners, if the premium upon such insurance exceeded fifty dollars."

The statutory provisions relating to the interest of a public officer in a public contract are found among the penal provisions of the Code, the sections with which we are chiefly concerned being Sections 12910 and 12911, General Code. These sections read as follows:

## Section 12910:

"Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

## Section 12911:

"Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The question first to be resolved is whether in the situation which you describe the individual concerned may be regarded as "holding an office of trust or profit."

I consider it obvious that the word "office" as used in the above sections refers to a public office. In the opinion by Spear, J., in *State, ex rel., v. Brennan*, 49 Ohio St., 33, at page 38, the following definition is quoted with approval from *Bradford v. Justices*, 33 Ga., 332:

"Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer. Whether he has been commissioned in form can make no difference; the commission is but evidence of title to the office."

The statutory provision for the appointment of a board of trustees for the purpose of operating a county hospital after it is fully completed and equipped is found in Section 3136, General Code, which reads as follows:

"When said hospital shall have been fully completed and sufficiently equipped for occupancy as hereinbefore provided, the county commissioners shall appoint a board of four trustees as

follows: One for one year, one for two years, one for three years and one for four years from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March, the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until his successor be appointed and qualified.

“The commissioners shall immediately fill any vacancy in such board which may be caused by death, resignation or removal, by appointment for the unexpired term. They may remove any trustee appointed by such board of commissioners for cause impairing faithful, efficient and intelligent administration, or for conduct unbecoming to such office, after an opportunity be given to be heard upon written charges; but no removal shall be made for political reasons.”

Under the provisions of Section 3137, General Code, such trustees are authorized and required to assume and continue the operation of the hospital concerned and to exercise the entire management and government of such hospital. They are authorized to engage employes with such technical skills as may be necessary for the proper care, control and management of such hospital and its inmates, fix the salaries and compensation of such employes, and remove them from such employment in their discretion. The board is authorized also to fix the compensation to be paid by or for all patients treated in such hospital and to provide in certain instances for free treatment of patients.

In view of the statutory provisions relative to the matter of appointment, tenure of office, and the responsible duties imposed on such board of trustees, I conclude that membership on such board constitutes a public office.

The next question for consideration is whether such public office is “an office of trust or profit” within the meaning of Sections 12910 and 12911, General Code.

In 42 American Jurisprudence, 897, 898, Section 23, the following statement relative to offices of trust or profit is found:

“Constitutions and laws sometimes contain provisions applying to lucrative offices, and offices of trust, honor, or profit. The courts have been called upon to define these terms, and they have characterized a lucrative office, or one of profit, as an office to which there is attached a compensation. The line between

'offices' and 'places of trust or profit' within the meaning of such provisions has not been clearly marked, and they may be considered as approaching each other so closely that they are in all essential features identical. \* \* \*"

In 35 Words and Phrases, 359, citing as authority *Ex parte Yale*, 24 Cal., 241, 244, the following statement is found:

"The term 'office' and 'public trust' in the Constitution are nearly synonymous; at least the term 'public trust' is included in the more comprehensive term 'office.' The terms have relation only to those persons and duties that are of a public nature."

The following statement relative to an office as constituting a trust is found in 32 Ohio Jurisprudence, 869, 870, Section 12:

"A public office is a public trust, and although compensation may attach as an incident of the office to enable the officer better to perform his duties by the more exclusive devotion of his time thereto, the office itself is created in the interest and for the benefit of the public. \* \* \*"

In view of these definitions and particularly in view of the important responsibilities placed by statute on the members of a board of hospital trustees, I am compelled to conclude that the position of membership on such board constitutes an office of trust within the meaning of Sections 12910 and 12911, General Code. Whether such office be "an office of profit," I do not deem it necessary here to consider, for the reason that the words "trust" and "profit" as used in these sections could not under any circumstances be considered synonymous. As I interpret these penal provisions, they would be applicable alike to an office of trust or to an office of profit; and it was not intended that such provisions should apply only to offices of trust *and* profit.

In your inquiry, you have indicated that the individual trustee concerned, is interested in the sale of various kinds of insurance other than fire. You will note, of course, that Sections 12910 and 12911, General Code, relate only to an interest in a "contract for the purchase of property, supplies or fire insurance." As hereinbefore noted, these are penal statutes and they must, therefore, be strictly construed. It is quite apparent that the sale of insurance of kinds other than fire insurance by a public officer to a public agency with which he is or is not connected

would present a conflict of interest which the legislature, in the determination of the public policy on this subject, might well have denounced. It was not, however, so denounced as a crime in either express or implied terms and, in view of the rule of strict construction with reference to penal statutes, I do not conceive it to be possible to add by interpretation to these statutes that which is not even implied therein. I must conclude, therefore, that in the situation which you describe the sale of insurance, other than fire insurance, to public agencies by a member of the board of hospital trustees is not prohibited by any of the provisions of Sections 12910 and 12911, General Code.

With respect to fire insurance, it clearly appears that a trustee of a county hospital is forbidden, under any circumstances, under the provisions of Section 12910, General Code, to be interested in such a contract with the public organization with which he is connected.

Under the provisions of Section 12911, General Code, however, a contract for fire insurance with a public institution with which such trustee is not connected appears not to be forbidden unless the amount of such contract exceeds the sum of fifty dollars. I have no difficulty in concluding here that in the case of a fire insurance contract the "amount of such contract" is measured by the amount of the premium payable thereunder by the public institution concerned.

There is, however, an additional proviso in Section 12911, General Code, to the effect that this section shall not be applicable where "such contract is let on bids only advertised as provided by law." In theory, it would appear, therefore, that the trustee with whose status we are here concerned might properly be interested in contracts of fire insurance with institutions with which he is not connected in those cases where the contract for such insurance is let on bids duly advertised as provided by law. As a practical matter, however, I do not find that there is any statutory provision for the letting of contracts for fire insurance on bids following advertisements therefor. In this connection, your attention is invited to the holding in Opinion No. 366, Opinions of the Attorney General for 1950, page 101, that where advertising for bids is not required by law, advantage cannot be taken of the saving clause in Section 12911, General Code, by action on the part of the public agency concerned in voluntarily advertising for bids and letting the contract to the lowest responsible bidder.

Accordingly and in specific answer to your inquiry, it is my opinion that :

1. A member of the board of trustees of a county hospital appointed pursuant to the provisions of Section 3136, General Code, is the incumbent of an office of trust or profit within the meaning of Sections 12910 and 12911, General Code.

2. Sections 12910 and 12911, General Code, constitute penal legislation and must be strictly construed against the state.

3. The enumeration in Sections 12910 and 12911, General Code, of the particular contracts in which a public officer is forbidden to be interested, which enumeration includes "fire insurance" contracts, has the effect of excluding from the application of these sections contracts for insurance other than fire insurance.

4. Section 12911, General Code, is not, by its own terms, applicable to contracts where the amount involved is fifty dollars or less; and the "amount" involved in a fire insurance contract is measured by the amount of the premium payable thereon.

5. Section 12911, General Code, does not forbid a trustee of a county hospital appointed under the provisions of Section 3136, General Code, to have an interest in a contract for the purchase of fire insurance by a political subdivision or public institution with which he is not connected where the amount of the premium payable under such contract exceeds the sum of fifty dollars and where such contract is let pursuant to bids duly advertised as may now or hereafter be provided by law; but such interest is forbidden by this section where such contract is let on competitive bids after advertisement, where such advertising for bids is not required by law.

Respectfully,

C. WILLIAM O'NEILL

Attorney General