

**OPINION NO. 71-020****Syllabus:**

1. Should Youngstown State University lease private property while a member of the University's board of trustees retains ownership in the leased property, there would in fact be a conflict of interest.

2. Even though the trustee abstains from voting on the contract or transaction, he has sufficient interest in the transaction to constitute a conflict of interest

To: A. L. Pugsley, Pres., Youngstown State University, Youngstown, Ohio  
By: William J. Brown, Attorney General, May 21, 1971

I have before me your request for my opinion with regard to the following facts:

Youngstown State University desires to lease privately-owned buildings for university use, on a temporary basis. The building to be leased is owned in part by one of the university trustees, who holds a one-eighth interest therein. Your letter requests an opinion upon the question of possible conflict of interest of the trustee with respect to the lease transaction. You also ask if the trustee in question may abstain from voting on the contemplated action, thereby avoiding conflict of interest implication.

The question of conflict of interest of public officials is the subject of Section 2919.08, Revised Code, which reads, in part as follows:

"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."

It is also noted that the foregoing section is a criminal statute and contains a penalty provision of from one to ten years upon conviction.

The first question raised by Section 2919.08, supra, is whether a trustee of a state university is a person "holding an office of trust or profit by election or appointment." 44 O. Jur. 2d, Public Officers, Section 5, Nature of Duties, states:

"\* \* \* [I]t is generally held that authority and power relating to the public interests, conferred by statute, and vested in an individual by election or appointment, create an office. Consequently, a public officer is one who exercises, in an independent capacity, a public function in the interest of the people by virtue of law,\* \* \* because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority.\* \* \*"

In view of the foregoing description, it is obvious that a state university trustee is a public official within the meaning of Section 2919.08, supra.

A second question requiring discussion is whether the phrase "interested in a contract for the purchase of property" in Section 2919.08, supra, is applicable to a lease of privately-owned property by a public road, agency or institution.

According to 29 O. Jur. 2d, Landlord and Tenant, Section 29, a lease is both a contract and a conveyance of an estate or interest in land. Many of the rules applicable to the law of contracts are equally applicable to the execution of leases. Thus, the immediate question is whether or not the execution of a lease for

a number of years is equivalent to "a contract for the purchase of property."

In a lease situation the owner retains the legal title to the property, with the right of reversion upon expiration of the term of the lease. The lessee, however, obtains the exclusive use of the premises, in exchange for the rentals and other consideration. Thus, for many purposes, the tenant, or lessee, has all the rights of ownership except title, during the term of the lease and as long as the conditions and covenants thereof are performed. It follows that the "interest" referred to in Section 2919.08, supra, includes the interest of a lessee as well as the interest obtained through a contract for an outright purchase of the title to property. I conclude, therefore, that Section 2919.08, supra, is applicable to a public lease of property as well as to the purchase of property.

It is also worth noting that Section 3313.33, Revised Code, as applicable to school board members, states in part:

"\* \* \*No member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board\* \* \*."

Ohio courts have long upheld the proposition set forth in Section 2919.08, supra, that public officials shall not have interest in contracts of their political subdivision, or public institution.

In In re Leach, 19 Ohio Op. 263 (1940), the Court affirmed the removal of a member of a board of education because he had a pecuniary interest in a contract with the board. The Court also said:

"\* \* \*[T]he statutes [predecessors to Sections 2919.08 and 3313.33, Revised Code] do not require the interest to be great, but merely provide that any pecuniary interest moving directly or indirectly to the officer is sufficient.\* \* \* It is not even necessary for the contract to be profitable to the officer.\* \* \*"

The leading Ohio case on the subject is Doll v. The State, 45 Ohio St. 445 (1887), where the court stated at page 449:

"\* \* \*To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state\* \* \*of which they are officers, might encourage favoritism, and fraudulent combinations and practices, not easily detected, and thus make such officers, charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this, was to prohibit all such contracts; \* \* \*"

(Emphasis added.)

The concept that it is against public policy to allow one to hold an office of trust in a public institution while simultaneously having an interest in a contract with that institution, is also found in Bellaire Goblet Co. v. City of Findlay, 5 Ohio C.C.R. 418, in which it is stated in the syllabus:

"Contracts entered into between a Board of Gas Trustees of a municipality and an incorporated company, when a member of the Board of Gas Trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void."

44 O. Jur. 2d, Public Officers, Section 77, points out:

"Public policy requires that an 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.\* \* \*[P]ublic officials, who are agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests, which they represent and which it is their duty to protect, and will not be permitted to derive any personal or pecuniary advantage or interest from the transaction.\* \* \*" Citing Halliday v. Norfolk and Western R. R. Co., 44 Ohio L. Abs. 208.

The public policy against conflicts in interest is so strong that, even where such an arrangement appears to be clearly innocent and beneficial to the public, the courts have refused to give it their sanction. Thus, in Grant v. Brouse, 1 Ohio N.P. 145, 146, a board of education had been buying goods from a firm in which a board member had an interest. As in your situation, there did not appear to be a loss, but rather a positive benefit to the public. Nevertheless, the Court ruled the arrangement improper, and said:

"In taking this view of the matter, we are not undertaking to censure anybody, because we believe that in this transaction, the board believed that it was discharging a public duty beneficially to the public. I have no doubt that the member of the board, who sold these articles, undertook to make a favorable arrangement for the public. Nothing to the contrary is asserted, and it is urged in fact, by the defendants, as a reason why this court should not interfere with its jurisdiction, that no pecuniary injury in fact resulted.

"The law was made in the interests of sound public policy, and while in some cases it may appear more advantageous to ignore than to obey the law, yet we think no public officer can violate a direct provision of law\* \* \*and have his conduct judicially approved."

I conclude from the foregoing cases and legal authority that it is not necessary that the public official vote on, or participate in, the transaction, to be "interested" within the meaning of Section 2919.08, supra.

In specific answer to your questions, it is my opinion that:

1. Should Youngstown State University lease private property while a member of the University's board of trustees retains ownership in the leased property, there would in fact be a conflict of interest.

2. Even though the trustee abstains from voting on the con-

tract or transaction, he has sufficient interest in the transaction to constitute a conflict of interest.