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COUNTY BOARD OF ELECTIONS—MEMBER—WHERE FIRM HAS AN OFFICE, MINORITY STOCKHOLDER OR EMPLOYEE, SUCH MEMBER MAY NOT SELL SUPPLIES TO COUNTY COMMISSIONERS, MUNICIPALITY OR BOARD OF EDUCATION—EXCEPTION—SAVING CLAUSE, SECTION 12911 G. C.—MAY SELL SUPPLIES TO STATE OF OHIO—CONTRACT—SECTION 12910 G. C.

SYLLABUS:

Under the provisions of sections 12910 and 12911, General Code, a firm having as one of its officers, minority stockholders and employes, a member of the county board of elections may sell supplies to the state of Ohio, but may not sell supplies to county commissioners, municipalities or boards of education within Ohio, unless such sale comes within the saving clause contained in section 12911, General Code.

COLUMBUS, OHIO, March 27, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent request for my opinion which reads as follows:

“A member of one of the Boards of Elections is also an officer, minority stockholder and employe of an incorporated company.

Is the member’s firm prohibited from selling supplies to the state of Ohio, to county commissioners, municipalities or boards of education within the state of Ohio?”

The sections of the General Code which are pertinent to your inquiry follow:

Section 12910, General Code:

“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, General Code:

“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.”

An examination of the above quoted sections reveals their broad scope; the former prohibiting a public officer from having any interest in a contract for the purchase of property, supplies or fire insurance for the use of the particular political subdivision, board or public institution with which he is connected, and the latter prohibiting such interest in a contract with any political subdivision, board or public institution with which he is not connected, if such contract exceeds the sum of \$50 unless it is let on bids duly advertised as provided by law. It will be noted that no specific mention is made of those contracts for the purchase of property, supplies and fire insurance for the use of the state itself. Prohibition of such contracts may arise only by including the state within the term “public institution” as used in those sections. Obviously, the state of Ohio is not a public institution; it is a body politic under whose law and authority public institutions are created and controlled.

Your letter inquires relative to a member of a county board of elections. It is evident that such member holds, by appointment, an office of both trust and profit and therefore would clearly fall within the provisions of sections 12910 and 12911, *supra*. The identical question has been presented to former Attorneys General and the opinions rendered by them clearly afford an affirmative answer. The syllabus of Opinion No. 2002 of the Opinions of the Attorney General for 1938, affirming Opinion No. 988, of the Opinions of the Attorney General for 1929, Volume II, page 1518, reads as follows:

“Members of county boards of elections are included within the terms of General Code Sections 12910 and 12911.”

The question now arises whether the corporation to which you refer in your letter may make contracts such as contemplated in sections 12910 and 12911. Those statutes are penal statutes applicable to public officials and by their terms do not specifically prohibit the making of such contracts.

The question of the legality of such contracts is discussed in 9 O. Jur., page 343, section 126, as follows:

“* * * the Ohio cases have made the effect of the imposition of a penalty depend upon the intent of the legislature; the mere infliction of a penalty for doing an act does not in every instance make a contract relating to the act illegal. To determine whether a contract made contrary to the provisions of a penal statute, is illegal and void, the statute must be considered as a whole, to ascertain whether or not it was the intention of the legislature that the statute should have such effect. It has been said that if the law has in view merely the increase of the revenue the contract is enforced; if it has in view the protection of the public the contract is held void.”

The purpose for which the above prohibitory sections was passed is well explained in the case of *Doll v. The State*, 45 O. S., 445. In the course of that opinion the Court, through Williams, J., in discussing section 6969 of the Revised Statutes (carried into the General Code as sections 12910 and 12911) at page 449, said:

“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, county, or municipality 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 in them, instruments of harm. The surest means of preventing this, was to prohibit all such contracts; and the legislature having employed language sufficiently clear and comprehensive for this purpose, there is no authority in the courts under the pretext of construction to render nugatory the positive provisions of the statute.”

In the light of what the Supreme Court has said above, it is evident that these sections are for the purpose of protecting the public from the possibility of a fraudulent public contract. The severe penalty of from one to ten years in the penitentiary clearly shows the intent of the Legislature to prevent the inception of such contracts. I am inclined to the view that even though the making of the contracts contemplated in sections 12910 and 12911, *supra*, was not expressly prohibited, such contracts may not be entered into and if made, are void and unenforceable at law.

Therefore, concurring with the opinion of this office cited, that a member of the board of elections is within the purview of sections 12910

and 12911, it remains to be determined whether such member who is an officer, stockholder and employe of an incorporated company desiring to do business with the state, counties, municipalities and boards of education, has such an interest, within the meaning of that term as used in these sections, in said company as to preclude the corporation from contracting for such business. The question of interest is one of fact rather than of law. However, it appears obvious that any individual who is at the same time an officer, minority stockholder and employe of a company is necessarily interested in contracts of and business transacted by said company. In connection therewith, I direct your attention to the second branch of the syllabus of *Doll v. The State*, supra, which reads as follows:

“To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient, if while acting as such officer, he sell the property to the city for its use, or is personally interested in the proceeds of the contract of sale, and receives the same or part thereof, or has some pecuniary interest or share in the contract.”

In specific answer to your inquiry, I am therefore of the opinion that a firm having as one of its officers, minority stockholders and employes, a member of the county board of elections may sell supplies to the state of Ohio, but may not sell supplies to county commissioners, municipalities or boards of education within Ohio, unless such sale comes within the saving clause contained in section 12911, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.