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1. BOARD OF EDUCATION—MEMBER EMPLOYED BY FIRM SELLING SCHOOL SUPPLIES—APPROVES ORDERS AS MEMBER—INTEREST IN CONTRACTS—SECTION 3313.33 RC.

2. BOARD OF EDUCATION—MEMBER—REGULARLY EMPLOYED AS ATTORNEY FOR CASUALTY COMPANY FROM WHICH BOARD PURCHASES INSURANCE AND BONDS—INTEREST IN CONTRACTS—SECTION 3313.33 RC.

SYLLABUS:

1. A member of a board of education who is employed by a concern which sells large quantities of school supplies to such board, upon orders which he, as a member of such board, approves, has an interest in such contracts of sale within the provisions of Section 3313.33, Revised Code.

2. A member of a board of education who is regularly employed as attorney by a casualty company from which said board purchases large amounts of insurance and bonds, has an interest in such contracts of purchase, within the provisions of Section 3313.33, Revised Code.

Columbus, Ohio, June 6, 1956

Hon. Jackson Bosch, Prosecuting Attorney
Butler County, Hamilton, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"I respectfully request your opinion for a determination as to whether or not the interest of a member of a board of education in this particular case being so remote and indirect that it would not keep him from serving as a member of said board of education.

In this particular instance 'A' is a member of the school board and at the same time works for a very large book and stationery supply company which has in the past done quite a bit of business with said school board. 'A' has no interest whatsoever in the company but being seventy-two years of age and retired from his regular work, does sell business machines and from any sale by him he receives a commission on the sale. These business machines are sold through the company and 'A' has no authority and does not sell any other supplies of the company and does not represent them in any other capacity. Of course, it is understood that he could not sell any business machines to the school board but as a member of the board, would possibly have to pass on or approve contracts between the school board and the company for other types of merchandise used in the school system.

"I have examined the opinions and decisions, which are as follows: (1) Opinion 2789, O.A.G. 1930, p. 1917; (2) Opinion 2854, O.A.G. 1938, p. 1596, and (3) In re Leach, 19 Ohio Opinions 263, also 179 O.A.G., 1933, p. 214. In all of these cases the interest was more tangible and direct than in the instant case and it seems from the facts presented here that this board member would have no pecuniary interest whatsoever and, therefore, possibly could serve as a member of the board of education and continue on with his work of selling business machines on a commission basis.

"Also, I would like to request an opinion similar to the above, wherein a member of the board of education is a practicing attorney, and being a practicing attorney is a member of a firm of lawyers who represent a large casualty insurance company. This attorney represents this casualty insurance company in court cases, defending them in suits on damage claims and counselling and advising the insurance company from time to time on their method of operation.

> "The board of education also purchases from this casualty company large amounts of insurance and bonds. The question then arises whether his being an employee of the insurance company and receiving fees from said insurance company would prevent him from being a member of the board of education and passing on contracts of insurance and bonds which said board of education may purchase."

Section 3313.33, Revised Code, reads as follows:

> "Conveyances made by a board of education shall be executed by the president and clerk thereof. 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. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.
>
> "This section does not apply where a member of the board, being a shareholder of a corporation but not being an officer or director thereof, owns not in excess of five per cent of the stock of such corporation. If a stockholder desires to avail himself of the exception, before entering upon such contract such person shall first file with the clerk an affidavit stating his exact status and connection with said corporation."

Similar provisions are found in the municipal law relating to officers of a municipal corporation.

Section 733.78, Revised Code (3808, G. C.) has a kindred provision as to such officers but the offense there is to have "any interest, other than any fixed compensation, in the expenditure of money on the part of such municipal corporation."

It will be noticed that the Section 3313.33 above quoted, does not carry with it any penalties. However, other provisions of the law do provide very severe penalties against an officer or *member of a board* who is interested in a contract for the purchase of "property, supplies or fire insurance" for the office or board with which he is connected. For instance, Section 2919.08, Revised Code, reads 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.

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

Section 2919.09, Revised Code, contains similar provisions making it unlawful for any such officer or board member to be "interested in" a contract for the use of a political subdivision with which he is *not connected,* if the amount of such contract exceeds fifty dollars unless such contract is let on bids advertised "as provided by law," and imposes a penalty of imprisonment for not less than one nor more than ten years.

It will thus be seen that the policy of the law as revealed by these several statutes, is to deal very severely with any public officer, including a member of a school board, who allows himself to get into such a position that he has *directly* or *indirectly* any interest in a contract which may be made by the board of which he is a member. In attempting to meet the many questions which have arisen as to the precise application of these laws, the courts and this office have been called upon to answer a large number of questions and the opinions on the subject are legion. It would be impossible, and probably unprofitable to attempt to review a large portion of them. I shall, however, comment upon the four to which you have called specific attention and which I think are typical of the general trend.

In Opinion No. 2788, Opinions of the Attorney General for 1930, page 1917, it was held that a member of council of a municipality who is a salaried president of an insurance agency company has an interest in any surety bonds which such insurance agency company should furnish to his municipality, within the meaning of Section 3808, General Code (now Section 733.78, R. C.). In the course of the opinion it was said:

> "It is natural to suppose that the president of an insurance agency, *although on a salary,* would be interested in enlarging the business done by his agency both from a personal and from a financial viewpoint. It is a well known fact that the salary a man receives is generally measured by the accomplishments he effects. If an agency doubles its business under his management, the possibility is that his financial remuneration will be increased. Conversely, if the agency diminishes in the amount of its business, the salary may be diminished and possibly if the overhead expenses of the agency are not met his salary would not be paid."

Here, of course, there enters the element of active management which may be attributed to the president of the company. The question at once

arises whether there should be any difference except in degree between the interest which a president on salary would have in building up his company, and an agent or employee who would have no managerial authority.

In opinion No. 179, Opinions of the Attorney General for 1933, page 214, it was held that a mayor or director of public service who is an *employee* of a concern selling supplies to the city of which he is an official, has an interest in such expenditures within the meaning of Section 3808, General Code, and within the meaning of a charter provision which prohibits an officer of the city from having an interest, direct or indirect, in any contract with the city or from being interested ether directly or indirectly in the sale of supplies to the city. In this case, it will be noted that the municipal officer in question was not an officer or manager of the concern selling supplies to the city but merely an employee. In the course of the opinion it was said at page 215:

> "Provisions such as these are merely enunciatory of common law principles. Nunemacher v. Louisville, 98 Ky. 384. These principles are that *no man can faithfully serve two masters and that a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which he owes to the public.* It is only natural that an officer who is an employe of a concern would be desirous of seeing a contract for the purchase of supplies by the city awarded to his employer, rather than to one with whom he has no relationship. Such an officer would certainly be interested in such a contract or expenditure, at least to the extent that upon the success of his employer's business financially *primarily depends the continued tenure of his position and the compensation he receives for his services as such employe.* This is especially objectionable where such officer (employe) is a *member of the board which makes such contract* or authorizes such expenditure on behalf of the city." * * * (Emphasis added.)

In Opinion No. 1649, Opinions of the Attorney General for 1937, page 2676, it was held:

> "Where a village treasurer serves as assistant cashier of a bank which becomes a depository for active funds of the village, a violation of Section 12912, General Code, is effected."

That was also a case where the employee was not in a managerial position in the bank. It merely illustrates the severity with which the statutes forbidding a public official to "serve two masters" have been applied.

In Opinion No. 2854, Opinions of the Attorney General for 1938, page 1596, it was held:

> "A company whose local manager is also a member of the board of education cannot submit sealed bids for contracts to furnish supplies to the board of education when competitive bidding on such contract is not required by law, as a contract made under such circumstances comes within the provisions set forth in Sections 4757 and 12910, General Code."

Sections 4757 and 12910, General Code, above referred to, are now embodied substantially in Sections 3313.33 and 2919.08, Revised Code, which I have quoted.

As I have already indicated, most of the situations to which these prohibitive and penal laws have been applied, are those in which the public officer in question was either the owner or in some way an officer of the business making the contract with the municipality or board. For instance, in the case of In re Leach, decided by the Common Pleas Court of Jackson County in 1940, and reported in 19 Ohio Opinions, 263, the court made a decree removing a member of the board of education from his office because he had directly or indirectly been interested in the sale of coal to such board, and the court went to considerable length to trace the somewhat intricate dealings to show that he had a really direct interest and that he knew or must have known that coal taken from his mines in one case from an abandoned mine, was being sold by his partner to the board of education.

The court also found him guilty of violation of the statute, in that he had allowed his minor son to be employed by the board of education, although he refrained from voting for his employment, and held that he had a right to the son's wages and therefore a pecuniary interest in such employment.

In the first case which you present, you state that the board member in question has no interest whatsoever in the company, and that he sells business machines for the company on a commission basis; further that he has no authority to sell and does not sell any other supplies of the company and could not sell any business machines to the school board. Your letter, however, does state that this company has in the past done considerable business with said board and is still making contracts of sale which have been approved by the party in question, as a member of the

board. I can not see that these extenuating circumstances can change the general rule or avoid the clear policy of the law, or the severity with which it has been applied, as indicated by the authorities above cited.

The fact that a board member may have only a slight pecuniary interest in a contract made by his board does not change the situation. In Wright v. Clark, 119 Ohio St., 462, involving a municipal officer, it was held as shown by the third branch of the syllabus:

> "Neither fraud, nor conspiracy, nor unreasonable profits, are necessary elements of a cause of action for recovery of money from an officer of a city or village, under the provisions of Section 3808, General Code."

In the case of In re Leach to which I have referred, the court in the course of the opinion said that it was not necessary for a contract to be profitable in the least to the officer. To the same effect see State v. Moon, 11 Abs., 96, Opinion No. 764, Opinions of the Attorney General for 1927, page 1326.

The severity with which the principles above enunciated have been applied could be illustrated by reference to many other opinions of this office.

I deem it proper, however, to direct particular attention to the second paragraph of Section 3313.33 supra, whereby it is provided that "this section does not apply where a member of the board being a shareholder of a corporation but not being an officer or director thereof, owns not in excess of 5% of the stock of such corporation." Such stockholder-member of the board "before entering upon such contract" must first disclose his ownership by filing an affidavit with the clerk of the board "stating his exact status." This provision was inserted in the law by act of the legislature in 1941, 119 Ohio Laws, page 763. In the same act, the legislature incorporated a similar provision with reference to contracts made by county commissioners, township trustees, and municipal officers. It is to be noted these legislative changes were all made *subsequent to the rendition of all the decisions and opinions* to which I have referred. Those provisions as then enacted contained a further provision that the stock ownership of such officer should not exceed $500 in value. At the previous session of the legislature in 1939, it granted a like absolution from the penalties of Sections 12910, 12911 and 12912, General Code.

By an act passed May 28, 1943, the entire school law was recodified and Section 4834-6, which is the predecessor of Section 3313.33 supra, was so enacted as to *eliminate the $500 restriction.* So that, so far as that section is concerned, a member of a board of education may have any sum whatsoever invested in the stock of a corporation so long as it is not in excess of 5% of the entire capital stock and such ownership of stock will not constitute an interest in such corporation or in a contract made with it by his board, within the provision of the statute forbidding him to have a direct or indirect interest.

The provision modifying the criminal laws, above mentioned, was contained in Section 12912-1, General Code (2919.11, Revised Code), and in its present form reads as follows:

> "Sections 2919.08 to 2919.10, inclusive, of the Revised Code, do not apply to the persons enumerated in said sections who are shareholders of a corporation and own five per cent or less of the stock not exceeding in value the sum of five hundred dollars, whichever limitation of ownership is the lesser in amount, and are not officers or directors thereof, when said corporation has made and entered into any of the contracts and transactions mentioned in said sections, *unless there exists a conspiracy to defraud.* If any stockholder desires to avail himself of this section, before entering upon such contract or transaction, such person shall first file with the clerk or fiscal officer of such county, township, municipal corporation, board of education, or public institution an affidavit, under oath, stating his exact status and connection with said corporation." (Emphasis added.)

Upon a very literal reading of the language of these provisions, they would appear to grant a degree of immunity to public officers *who are stockholders* in a corporation that would destroy the purpose and effect of the prohibitative statutes as to stockholder-officers. As stated in the second paragraph of Section 3313.33 supra, *"this section does not apply* where a member of the board, being a shareholder", etc. In Section 2919.11 supra, it is said: "sections 2919.08 to 2919.10 of the Revised Code *do not apply* to the persons enumerated in such section, who are shareholders", etc. I cannot, however, bring myself to believe that the legislature intended to destroy the effectiveness of these long established restrictions on the conduct of public officers, and must conclude that it was only the intention to provide that the mere ownership of a limited amount of stock in such corporation should not be evidence of an unlawful interest in a contract made with such corporation.

Accordingly, I must apply the rules laid down in the opinions to which I have referred. In the case of the board member who is an employee selling certain articles on commission for a company which has extensive dealings with his board, it would of course be impossible from the facts which you state to trace any actual interest which he might have as a member of the board, in contracts made by his board with that corporation. However, it must be manifiest that a company which deals extensively with a board of education in the sale of school equipment, would certainly be put in a highly advantageous position by having one of its employees on the board of education, and the temptation on the part of that board member to throw all of his influence in favor of the company by which he is employed, would seem almost overpowering. This seems to me to bring this employee clearly within the situation and conclusion set out in the 1933 opinion to which I have referred. That opinion dealt with a mere employee of a concern selling supplies to the city of which he was an officer. The opinion, after setting out the fundamental proposition that "no man can faithfully serve two masters, and that a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which it owes to the public," went on to declare that "such an officer would certainly be interested in such a contract or expenditure, at least to the extent that upon the success of his employer's business financially, primarily depends the continued tenure of his position and the compensation he receives for his services as such employee."

Accordingly, it is my conclusion that as to the board member referred to in your first proposition, he does come within the intent of the law prohibiting him from having an interest direct or indirect in a contract of his board.

As to your second proposition I must apply the same reasoning and reach the same conclusion. Manifestly, it would be highly to the interest of a casualty company doing a large business with a board of education in the sale of insurance and bonds, to have their regular attorney sitting on such board, and he certainly would have a strong motive as a member of such board, to see to it that the business of the board went to that casualty company.

In reaching this conclusion I am not, of course, undertaking to challenge the integrity or impugn the motives of either of the officers referred to in your communication, but am only pointing out what I

believe to be the dangers arising out of dual employments of the character mentioned and the obvious abuses that could arise if such a situation should be sanctioned.

In specific answer to your questions it is my opinion:

1. A member of a board of education who is employed by a concern which sells large quantities of school supplies to such board upon orders which he as a member of such board approves, has an interest in such contracts of sale within the provisions of Section 3313.33, Revised Code.

2. A member of a board of education who is regularly employed as attorney by a casualty company from which said board purchases large amounts of insurance and bonds, has an interest in such contracts of purchase within the provisions of Section 3313.33, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General