

OPINION NO. 70-107**Syllabus:**

1. Section 3313.33, Revised Code, in the absence of extenuating circumstances, would prohibit the board of education from purchasing electrical power and heating units from an electrical power company where a member of the board is an employee of said power company.

2. Section 3313.33, Revised Code, would not prohibit the board of education from purchasing electrical power and heating units from an electrical power company where a member of the board is an employee of said power company if there were no other sources of electrical power for use in the schools.

3. Section 3313.33, Revised Code, would not prohibit the board of education from contracting with an oil company for the furnishing of fuel oil for the operation of the schools where a member of the board of education is an independent contractor, who does distribute products of said oil company, but who is neither a contracting party with the school board, nor does he furnish said fuel oil to the schools.

To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio
By: Paul W. Brown, Attorney General, August 17, 1970

I have before me your request for my opinion, which request reads as follows:

"No member of the Board of Education shall have directly or indirectly, an pecuniary interest in a contract of the Board..."

"Would this Section prohibit the Board of Education from purchasing electrical power from an electrical service company where a member of the Board is an employee of the Power Company?"

"Also would this section prohibit a contract between the Board of Education and an electrical service company for the installation of an electric heating system in a new school where a member of the Board of Education is an employee of the Power Company?"

"Secondly, would it make a difference in the law if there were no other source of electrical power for use in the schools?

"Thirdly, would it be improper for a board of education to contract with an oil company for the furnishing of fuel oil for the operation of the schools where a member of the Board of Education is an independent contractor, in the legal sense, but does distribute the products of said oil company, even though the Board member is not a contracting party, nor does he furnish said fuel oil to the schools?"

The questions you have raised involve the problems of conflicting interests of public officers, which is dealt with by Section 3313.33, Revised Code, which reads in part 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 the board.* * *"

The question that at once presents itself is whether the members of the board of education in the case you present have a 'pecuniary interest' in the contracts between the board of education and the power and oil companies. The application of Section 3313.33, supra, to analogous situations in the past has been uniformly strict.

While I will not unduly lengthen this opinion by citing all such holdings, the law was thoroughly reviewed in three earlier Opinions of the Attorney General. In Opinion No. 6672, Opinions of the Attorney General for 1956, page 432, one of my predecessors held that a contract between a school supplier and a board of education was invalid where a member of such board was employed by the supplier in a relationship which had no bearing on the school contracts. The Attorney General stated that:

"In the case of a board member who is an employee selling certain articles on commission for a company which has extensive dealings with the board, it would of course be impossible from the facts 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 manifest 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 the board member to throw all of his influence in favor of

the company of which he is employed, would seem almost overpowering."

In Opinion No. 3075, Opinions of the Attorney General for 1948, page 197, this office was called upon to rule on a situation in which a member of a board of education was employed as a salaried foreman by an automobile dealer who sold automobiles to the board. The Attorney General reasoned that the employee had such an interest in the contract as is forbidden by Section 3313.33, Revised Code, notwithstanding the fact that he was not a stockholder or partner in the business, nor did he have any bonus agreement with his employer, but he worked on a straight salary basis. The Opinion went on to state:

"* * *It is too obvious to admit of argument that if an employee who is a member of the board of education is in a position to throw to his employer large and profitable contracts, he will inevitably build up for himself a standing with his firm and in all probability ultimately reap substantial rewards growing out of his usefulness in that respect."

These Opinions were followed by Opinion No. 2466, Opinions of the Attorney General for 1961, page 494, where the Attorney General reasoned that contracts between a milk company and a board of education were invalid where said milk company employed two members of the board as milk truck drivers, and that the contract for the sale of school buses between a board of education and auto sales agency was also invalid when said agency employed a board member.

Principles such as these are merely enunciatory of the common law principles dated in Nunemacher v. Louisville, 98 Ky. 334 (1896). These principles are:

"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 his obligations which he owes to the public. It is only natural that an officer who is an employee 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."

As a result of the law reviewed in these Opinions, which law remains unchanged, the contracts between the electric company and the board of education are apparently invalid when there are no extenuating circumstances.

However, in regard to your second question it would seem that it does make a difference in the law if there is no other source of electrical power for use in the schools.

The purpose of Section 3313.33, supra, which forbids any member of the school board from having any direct or indirect pecuniary interest in any contract of the board, as interpreted by the courts and this office, is to guard against the dangers arising out of dual employment of the character mentioned and

the obvious abuses that could arise if such a situation should be sanctioned. In doing so, the statute prohibits any board member from securing personal monetary benefits by using his public office in a wrongful manner. This reasoning is clearly seen in the three Opinions mentioned above where a conflict of interest was established between school board members and employees because of the possibility of said board members influencing the school board's decision to the advantage of their employers.

If there were only one source of electrical power that could be used in the schools, it would be impossible for any employee (officer) to influence the school board's decision. This case could then be distinguished from the earlier opinions of this office mentioned above, on the grounds that any influence or advantage possessed by the board member for the benefit of his employer, under these circumstances, would be nonexistent.

In regard to your third question on whether it would be improper for a board of education to contract with an oil company for the furnishing of fuel oil for the operation of the schools where a member of the board of education is an independent contractor, in the legal sense, but does distribute the products of said oil company, even though the board member is not a contracting party or furnish said fuel oil to the school, the relevant provision is again Section 3313.33, Revised Code, which is quoted above.

There is no proof or indication from your question that the board member in question had any pecuniary interest in the contract of the board of education with the oil company, or that there is any conflict of interest between his business as an independent contractor, in business for himself, who purchases fuel oil and petroleum products from the oil company and sells them to his customers, and his duties to the public as a board member. In his business of being an independent contractor, the board member simply purchases products from the same oil company from which the board of education wishes to contract for the supply of fuel oil for its schools. The board member is neither an employee of the oil company nor does he furnish fuel oil to the schools. To prohibit a contract with the oil company under these circumstances would be to seriously inhibit the power of school boards to contract, due to the representation on boards of education of many professions, vocations, and occupations such as contractors, merchants, doctors, dentists, materialmen and a host of other callings, for the simple reason that, as a member of the board of education, each by reason of his private vocation could possibly have done business with such firms.

In the case of State, ex rel. Corrigan v. Hensel, 2 Ohio St. 2d 96, 206 N.E. (2d) 563 (1965), it was held that a certain school board member's personal and private business, the operation of an employment bureau for academic personnel, was neither inconsistent nor incompatible with his duties to the public as a board member, and it was held not to be a conflict of interest in violation of Section 3313.33, Revised Code. The Court reasoned that if a member of a school board should be subject to removal from office on the ground that by reason of his private occupation he might "possibly" or "could" secure personal monetary benefits by using his public office in a wrongful manner, then membership on boards of education would be denied to mem-

bers of many professions and vocations for the reason that, as a member of the board of education, each by reason of his private vocation could possibly have an interest in procuring a contract or financial favor from the board of education and school officials.

In conclusion, therefore, it is my opinion and you are hereby advised that:

1. Section 3313.33, Revised Code, in the absence of extenuating circumstances, would prohibit the board of education from purchasing electrical power and heating units from an electrical power company where a member of the board is an employee of said power company.
2. Section 3313.33, Revised Code, would not prohibit the board of education from purchasing electrical power and heating units from an electrical power company where a member of the board is an employee of said power company if there were no other sources of electrical power for use in the schools.
3. Section 3313.33, Revised Code, would not prohibit the board of education from contracting with an oil company for the furnishing of fuel oil for the operation of the schools where a member of the board of education is an independent contractor, who does distribute the products of said oil company, but who is neither a contracting party with the school board, nor does he furnish said fuel oil to the schools.