

988.

BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—MEMBERS AND EMPLOYEES—SALE OF SUPPLIES AND FIRE INSURANCE BY THEM TO SUCH BOARD ILLEGAL.

SYLLABUS:

Members and employes of the Boards of Deputy State Supervisors and Inspectors of Elections are included within the terms of Section 12910, of the General Code.

COLUMBUS, OHIO, October 5, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows:

“May a member of the Board of Deputy State Supervisors and Inspectors of Elections make sales of supplies and insurance to such Boards of Elections?”

The prohibitory sections of the General Code which must be considered are:

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.”

In previous opinions of this department, it has been held that the conduct of elections belongs to the state, is under the control of state officers and state agencies and that Deputy State Supervisors of Elections are neither county, township nor municipal officers. (Opinions of the Attorney General, 1917, Vol. II, page 1683).

Sections 12910 and 12911 of the General Code, *supra*, are given a very broad scope in their effect by the Legislature; the one prohibiting officers from being interested in contracts involving the political subdivision with which the officer is connected, and the other prohibiting such contracts with any other political subdivision of the state. Contracts on behalf of the state itself or, to be more definite, contracts for the purchase of property, fire insurance or supplies for the use of the state, are not comprised within the terms of either statute, unless through use of the words “public institution.”

Although Section 12910, *supra*, is a penal statute, serious question may be raised as to it being subject to the rule that penal statutes must be strictly construed, because the statute is declaratory of a fundamental principle of common law that a public officer cannot sell to himself.

In an opinion rendered by this office, on July 20, 1929, to your Bureau, in which it was held that the Cleveland Metropolitan Park District was an institution within the meaning of Section 12910, General Code, a lengthy discussion of the term "public institution" ensued.

The term "institution" when used in connection with public functions has received various interpretations. In *State ex rel. vs. Guilbert Auditor, vs. Kilgour, et al.*, 8 O. N. P. (N. S.) 617, it was held that "institution" comprehends "corporations" or "associations" established by law, having the attributes of permanency, as distinguished from the temporary establishment of individual or partnership effort, together with officers and members. In this case the court so construed the law relating to banking institutions. In the case of *Gerke vs. Purcell*, 25 O. S., 229, it was held that "institution" sometimes refers to an establishment or place of business, and sometimes to an organized body. The latter case was cited as an authority in the case of the *Benjamin Rose Institute vs. Myers, Treas. et al.*, 92 O. S., 252. In the latter case the Supreme Court was construing the phrase "institution of purely public charity" as used in the constitution in relation to tax exemptions and among other things cited with approval in its opinion a Georgia case which held:

"The term 'institution' is sometimes used as descriptive of an establishment, or place, where the business or operations of a society or association is carried on; at other times it is used to designate the organized body. *Gerke vs. Purcell*, 25 O. S., 244."

In *Toledo Bank vs. Bond*, 1 Ohio State, page 643, Chief Justice Bartley said in the opinion:

"Public institutions are those which are created and exist by public law or authority."

In *Dodge vs. Williams*, 46 Wis. 70, 101, it was said in the opinion:

"In legal parlance the term 'institution' implies foundation by law, by enactment, or by prescription."

The foregoing will indicate that the term "public institution" is a rather broad term and may include a Board of Deputy State Supervisors of Elections.

Section 12910, General Code, and cognate sections of the Code, have been considered in a number of opinions of this office, and the universal holding is that in whatever manner the officer or employer is interested in a contract, such contract is void.

In 13 Corpus Juris, at page 434, in considering jointly the legality of contracts entered into by public officers charged with the letting and making of public contracts, it is said:

"Another class of agreements which are within the rule are those between a state and county, or other municipal corporation for the doing of work or the furnishing of supplies with one of its own officers or with a company or body of men of which such officer is one, or in which he is interested."

In an opinion of the Attorney General for 1928, page 2005, it was held that a purchase of coal made by a state institution from a corporation, a stockholder of which is at the time one of the trustees of said institution, is contrary to law, being prohibited by the terms of Section 12910, General Code.

In the case of *Doll vs. State*, 45 O. S., 449, the court in consideration of the provisions of Section 6969, Revised Statutes, now Section 12910, General Code, 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 to them, instruments of harm. The surest means of preventing this was to prohibit all such contracts."

In the leading case of *State vs. Jennings*, 57 O. S., 415, Judge Minshall says:

"Many efforts have been made to define a public office * * * . It is easier to conceive the general requirements of such an office, than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and the authorities, that the most general distinction of a public office is, that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of state."

In *State ex rel vs. Brennan*, 49 O. S., Judge Spears says, at page 38:

"It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incident to transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, of which public functions to be exercised in the supposed interest of the people, the services to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

In the recent case of *Wright vs. Clark*, 119 O. S., 462 (1 Ohio Bar. No. 44), in holding that the engineer of a municipality is inhibited by Section 3808, General Code, from becoming interested in expenditures by the municipality, Chief Justice Marshall said, in his opinion:

"We must look to the spirit as well as the letter of the statute."

The spirit of Section 12910, General Code, supra, clearly was to prohibit anyone who is in an official position from selling to himself.

In my opinion in the use of the term "public institutions" in Section 12910, supra, the General Assembly clearly intended to include boards such as you mention.

While your inquiry refers merely to "insurance", it will be noted that Sections 12910 and 12911, supra, use the term "fire insurance." We infer, therefore, that you refer to fire insurance, and it is to be understood that this opinion in the discussion of applicability of Sections 12910 and 12911, supra, is limited to the subject of fire insurance.

You are advised, therefore, that a member of the Board of Deputy State Supervisors and Inspectors of Elections may not make sales of fire insurance or supplies to such board.

Respectfully,
GILBERT BETTMAN,
Attorney General.