OPINION NO. 73-043

Syllabus:

An employee of an insurance company which has contracts with a city cannot at the same time become a member of the city council.

To: Donald L. Jones, Washington County Pros. Atty., Marietta, Ohio
By: William J. Brown, Attorney General, May 7, 1973

Your request for my opinion states the facts and poses the issue in the following language:

> 1. The subject individual is an employee, and representative, of the company that provides

the hospital and medical insurance for the officers and employees of the City of Marietta.

2. The subject individual is on salary which is in no way affected by the City's hospital and medical insurance contract, although such contract is within the scope of his administrative duties.

3. Insurance premiums are paid entirely by the City of Marietta as authorized by the Marietta City Council.

4. The insurance company is a non-profit corporation in which the subject individual has no interest, except as a salaried employee.

ISSUE: Can the subject individual hold office as Councilman for the City of Marietta?

The qualifications for elected officials of a legislative authority are stated in R.C. 731.02. This Section reads as follows:

> Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of the legislative authority shall be an elector of the city, shall not hold any other public office or employment except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of such qualifications, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office. (Emphasis added.)

Further qualifications for holding public office appear in R.C. 733.78, which specifically prohibits an officer of a municipality from having any interest in municipal contracts. That Section reads as follows:

> No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation. Any person who violates this section shall be disqualified from holding any office of trust or profit in the municipal corporation, and shall be liable to the municipal corporation for all sums of money or other things received by him, in violation of this section, and if in office he shall be dismissed therefrom. (Emphasis added.)

"Any interest" is broad in its sweeping prohibition. A public officer must be beyond temptation and he should not be in a

position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective.

My predecessor, in Opinion No. 66-162, Opinions of the Attorney General for 1966, stated that no officer of a municipal corporation shall have any interest (other than his fixed compensation) in the expenditure of money on the part of such municipal corporation. This prohibition exists regardless of whether such expenditure derives from a contract made by the person with the municipality before he becomes an officer. The Opinion states further that there is no exception from this explicit prohibition because of good faith of the official, and none can reasonably be implied in the face of the plain language of such prohibition.

Furthermore, there is a criminal statute especially directed toward municipal officers having an interest in municipal contracts. R.C. 2919.10 provides:

> No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall be interested in the profits of a contract, job, work, or services for such municipal corporation or township, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employee of the contractor of such contract, job, work, or services while in office.
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> Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both.
>
> (Emphasis added.)

In Opinion No. 2788, Opinions of the Attorney General for 1930, it was held that a member of council of a municipality, who is a salaried president of an insurance agency, has an interest in any sureties which such agency should furnish to his municipality within the meaning of R.C. 733.78 (then G.C. 3808).

> 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.
(Emphasis added.)

That Opinion involved the element of active management which may be attributed to the president of the company. The question here is whether there is any essential difference between the interest which a president on salary has in building up his company, and that of an agent or employee who has no management authority.

In Opinion No. 179, Opinions of the Attorney General for 1933, my predecessor stated 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 statutory language, and within the meaning of that city's charter provision which prohibited an officer of the city from having any direct or indirect interest in a contract with the city, or from being interested either directly or indirectly in the sale of supplies or services to the city. It should be noted that the municipal officer in that case was not an officer or manager of the concern dealing in the sale of services or supplies to the city, but merely an employee. In the course of the Opinion it was stated:

> Provisions such as these are merely enunciatory of common law principles. 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 is a member of the board which makes such contract or authorizes such expenditure on behalf of the city. * * *
> (Emphasis added.)

Similarly, my predecessor in Opinion No. 6672, Opinions of the Attorney General for 1956, ruled that a member of the municipal board of education employed by a company selling school supplies to the city, had an interest in the contract. In addition, this same Opinion stated that a municipal board of education member, who was regularly employed as an attorney for an insurance company supplying insurance to the city, also had an interest in the contract. The test used in both of these instances was twofold, that is, whether the board approved these contracts, and whether the employee could derive some benefit, by virtue of his position as a municipal officer, from the company's business with the municipality. Thus, of paramount interest in the resolution of the issue presented in the present case is the extent of interest the municipal officer has in the company which is dealing with the

city. In addition, of prime consideration, is the question of whether the municipal officer receives compensation by way of commission from his employer or whether he gains any substantial or indirect benefit by his position as municipal officer.

In the present case we are dealing with an individual who is merely an agent of a nonprofit corporation doing business with the city. He has no control over said corporation and ostensibly no financial interest in contracts between the city and his employer. As stipulated in the request for this Opinion, he receives a fixed salary with no commission allowances for additional sales made in the course of his employment.

It cannot be said, however, that he has no interest in the contracts between his employer and the municipality with which he seeks public office. As a member of the municipal council, he will be in a position to approve or disapprove insurance matters involving his employer-insurance company and the municipality, and he will have an interest in perpetuating the contractural relationship between the city and his employer. That interest results from the fact that his salary from the insurance company may be influenced at least indirectly, on the company's continued dealing with the municipality.

In specific answer to your question it is my opinion, and you are so advised, that an employee of an insurance company which has contracts with a city cannot at the same time become a member of the city council.