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EDUCATION, BOARD OF—CONTRACTS MADE BY BOARD OF
EDUCATION WITH HUSBAND OF MEMBER OF BOARD—
PRINTING AND SUPPLIES—SUCH CONTRACT MAY NOT BE
ENTERED INTO UNDER PROVISIONS OF SECTION 3313.33 RC.

SYLLABUS:

The provisions of Section 3313.33, Revised Code, are applicable to contracts made by a board of education with the husband of one of the members of such board.

Columbus, Ohio, May 26, 1954

Hon. Thomas F. Dewey, Prosecuting Attorney
Sandusky County, Fremont, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“The Board of Education of the Village of Clyde, Ohio, has requested that I obtain an opinion from your office on the following question :

“Can a Board of Education buy supplies and printing from the Clyde Enterprise, which is a partnership owned and operated by John J. and his sister Mary J., when at the same time the wife of John J. is a duly elected and acting member of the School Board of the Village of Clyde ?

“Section 3313.33 of the Revised Code of Ohio is as follows :

“ ‘No member of the Board shall have, directly or indirectly, a pecuniary interest in a contract of the Board of which he is a member, except as a Clerk.’

“The question, as I see it, is whether or not the wife, who is a member of the school board, has an indirect pecuniary interest in the contract of the board because of the fact that she is the wife of the contracting party. It should be further noted that she owns no interest in the partnership business.”

The provision you have quoted above from Section 3313.33, Revised Code, was formerly set out in Section 4834-6, General Code, and earlier still was found in Section 4757, General Code. This section, together with the penal provisions of Section 12932, General Code, was subjected to scrutiny by one of my predecessors in Opinion No. 1674, Opinions of the Attorney General for 1920, page 1122, in a case involving the employment of a teacher who was the wife of a member of the board of education concerned.

As to the application of the criminal sanctions in Section 12932, *supra*, the writer said, p. 1123 :

“Yet, the participation in such an act by the husband board member as that of employing his wife as a teacher in the schools under control of his board, is, without doubt, a violation of the spirit of this statute. This statement rests upon the common

knowledge of husbands, and people generally, as to what is supposed to be the meaning and intention of such legislation. But in criminal law, an act which is supposed to violate the spirit of the law but is not expressed in the words of the law cannot, *under a strict construction thereof*, be made to come under its terms. Nor does the fact that the husband's vote, as your statement affirms, was the deciding vote bring his act within section 12932 G. C.

"As pointed out in the opinion above referred to, Section 12932 G. C. was enacted in 1899. At that time, and it is believed until recently, the very general custom of boards of education was not to employ married women living with their husbands as teachers, and it may be supposed that the knowledge of that custom was before the legislature passing this statute, the satisfactory reason for such a custom deciding them in omitting 'wife' in the catalogue of relationships from the law when passed. However, this may be conjecture, but it is pertinent conjecture on an existing general usage."

Coming then to consider the inhibition set out in Section 4757, General Code, the writer said, pp. 1123, 1124:

"This leads us to consider another statute in reaching a disposition of this question. Section 4757 G. C. reads in part thus:

"* * * No member of the board shall have directly or indirectly any pecuniary interest in any contract of the board * * *."

"Under the law in Ohio the husband is required to support his wife and minor children out of his property or by his labor. It is apparent and a matter of common knowledge that when the wife is receiving wages, the outlay by the husband for her support is not, in a usual case, so great or so urgent; and may be and is in many cases wholly absent. It is very justly to be said that a husband board member voting to employ his wife as a teacher in the schools under control of his board could not be unmindful of the advantages that the wages thus put into the wifely purse might mitigate somewhat against the depletion of the money coming into the husbandly purse and thus add to the comfort of himself and his household. And while that might not be the only reason disposing him to cast a favorable vote, yet it could be a very moving reason not to vote otherwise.

"On the other hand, the Ohio law is, that if the husband is unable to support his wife and minor children the wife must assist him so far as she is able. (See section 7997 G. C.)

"If the husband's inability to furnish support is not such as to prevent his being an active member of the board of education,

as is by no means an impossible proposition, and he votes to employ his wife as a teacher, it must be held in such a case that he is, to say the very least, quite a good deal interested pecuniarily in such a contract."

I deem the reasoning thus stated to be highly persuasive on the point of what constitutes an indirect pecuniary interest of one spouse in the property and contracts of the other. I am favorably impressed also with the conclusion that the inhibitions in Section 4757, General Code, may so apply as to void a contract in a situation where the criminal sanctions of Section 12932, General Code, could not be imposed.

The Supreme Court, however, has ruled otherwise in a case involving an essentially identical fact situation. In *Board of Education v. Boal*, 104 Ohio St., 482, the syllabus is as follows:

"1. Where a statute defining an offense designates one class of persons as subject to its penalties, all other persons are deemed to be exempted therefrom.

"2. The legislature having prohibited a member of the board of education from participating in the making of a contract with a person as teacher in a public school to whom he or she is related as father or brother, mother or sister, by express provisions of Section 12932, General Code, the courts are not authorized to extend such prohibitory provision so as to include the relation of husband and wife or other relations not therein specified."

It is to be noted that this cause arose in the Common Pleas Court as a taxpayers' action and the issue was whether the contract of employment was void; and there was not involved, of course, any attempt to impose criminal sanctions. In this situation it is somewhat surprising that the court failed to indicate the process of reasoning by which such great weight was given the language of the criminal statute, especially to the omission of the words "wife" and "husband". One is surprised also that the opinion omits any discussion of the "indirect pecuniary interest" which is the subject of condemnation in Section 4757, General Code, there being only a passing reference in the opinion to such section.

The only language in this opinion in this case which can be supposed to refer even indirectly to the question of the indirect pecuniary interest denounced by the terms of Section 4757, supra, is the following, pp. 484, 485:

"The contract of employment as teacher in the schools of Zaleski village school district was duly entered into by Jenola

McKibben and the board of education of that district as to manner and form in full compliance with the provisions of the statutes having reference thereto. The rights of a married woman in this state have been extended by express provisions of our laws, and she now has the full power to contract, and the unlimited right to have and enjoy the benefits of her contracts and the fruits of her employment. These modern statutes relating to the property rights of married women are generally intended to cut off the common-law rights of the husband to the personal estate of the wife. They have been construed to constitute as her separate estate a separate business or trade which she may carry on, and all the property incident thereto. Under the provisions referred to, the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can in any wise be claimed by the husband as against her. 13 Ruling Case Law, 1149, Section 173.

“If the power to contract in her own right, or the enjoyment of the fruits of her employment, is to be denied or limited, such denial or abridgment thereof must be found in some express provision of the legislation of the state. It cannot be imposed by action of the court.”

As to the necessary effect of the decision in this case, however, we can entertain no doubt. Such effect is that the provisions of Section 4757, General Code, now Section 3313.33, Revised Code, do not forbid a contract of employment by a board of education of the wife of a member of such board. Although the court did not mention the point in its decision, the impression is given that the court considered Sections 4757 and 12932, General Code, in *pari materia*, and concluded that because the contract under scrutiny was not within the scope of the latter it could not be deemed to involve an indirect pecuniary interest within the meaning of the former.

In the case at hand, the provisions of Section 12932, General Code, now Section 3319.21, Revised Code, can have no application for we are not here concerned with the employment of a teacher or instructor. The penal provisions relative to board of education contracts in which members have an interest is Section 2919.08, Revised Code, formerly Section 12910, General Code. This section reads:

“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.”

The question here presented thus involves no question of applying language similar to that in Section 12932, General Code, which was accorded such persuasive effect in the Boal case, for we are here concerned only with what constitutes “indirectly” a “pecuniary interest.” Accordingly, there is no comparable basis in the instant case for the application of the rule in that case, and I do not regard that decision in any way dispositive of the question here under scrutiny.

I deem the reasoning set out in the 1920 opinion, *supra*, to be fully applicable to the situation you have described and I consider that a wife has, at the least indirectly, a very real pecuniary interest in the business contracts of her husband, especially in view of the husband’s statutory duty to support his wife. See Section 3103.03, Revised Code. For these reasons I conclude, in specific answer to your inquiry, that the provisions of Section 3313.33, Revised Code, are applicable to contracts made by a board of education with the husband of one of the members of such board.

Respectfully,
C. WILLIAM O’NEILL
Attorney General