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EDUCATION, BOARD OF—SCHOOL BUSES MAY NOT BE PURCHASED FROM AUTOMOBILE DEALER WHOSE FOREMAN IS A MEMBER OF THE SCHOOL BOARD—CONTRACT FOR SUCH TRANSACTION ILLEGAL—SECTION 4834-6 G. C.

SYLLABUS:

Where a board of education undertakes to purchase school buses of a dealer whose foreman is a member of such board, such contract is under the terms of Section 4834-6, General Code, an illegal contract.

Columbus, Ohio, April 21, 1948

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

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

“A member of the board of education of a school district is employed as foreman by a local automobile dealer. This member is neither a stockholder nor partner in said business, does not have any bonus arrangement with his employer, and works on a straight salary basis.

“This board of education desired to purchase four buses, and various local dealers, including the dealer who employs the board member, submitted offers to sell buses to the board. The board did not advertise for bids, neither did it issue formal invitations to bid. The offers to sell were opened from time to time as received by the Transportation Committee (of the board) and thereafter, at a meeting of the board, the offers were considered and two contracts for the purchase of buses were awarded; one for two buses to the dealer who employs the board member and one for two buses to another dealer. The bid of the dealer who employs the board member was not the lowest bid.

“May we request your opinion, either formal or informal, in the following question at your earliest convenience:

“Under the circumstances as outlined above, may the board of education legally award a contract for the purchase of the two school buses to the dealer who employs the member of this board of education?”

Section 4834-6 of the General 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.

The provisions of this section prohibiting any member of the board from having any pecuniary interest in any contract of the board, shall 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 percentum of the stock of such corporation. If a stockholder desires to avail himself of the exception provided in this section, before entering upon such contract such person shall first file with the clerk of the board an affidavit stating his exact status and connection with said corporation.”

Section 12910, General Code, appears to be pertinent. This section reads as follows:

“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.”

The first section above quoted is not a penal section and does not carry with it any provision for punishment of a member of the board who violates it. It does however appear to have a bearing on the validity of a contract made in disregard of its prohibition.

The question at once presents itself whether the member of the board in the case you present has a "pecuniary interest" in the contract whereby the firm of which he is an employe and foreman, sells buses to the board of which he is a member. Under numerous decisions, it appears to me to be made very plain that he has such an interest in this contract as is forbidden by both of the statutes quoted, notwithstanding the fact that he is not a stockholder or partner in the business, does not have any bonus arrangement with his employer and works on a straight salary basis. It is too obvious to admit of argument that if an employe 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. This is particularly true where as in the present case, purchases are to be made by the board which do not have to be advertised and competitive bidding is not required.

The authorities are numerous I believe, which hold that under such circumstances the employe in question would have a pecuniary interest in such a contract. In the case of *In re Leach*, 19 O. O., 263, this proposition was discussed at length, and it was held :

"6. Any pecuniary interest moving directly or indirectly to the officers is sufficient under Section 4757, General Code; it is not even necessary for the contract to be profitable to the officer under Sections 12910 and 12911, General Code.

7. The pecuniary interest of a member of a board of education in a contract for the purchase of coal and in the employment of his minor son as janitor by such board, constitutes a ground for removal from office under Section 10-1, General Code."

In an opinion of one of my predecessors, found in 1938 Opinions of the Attorney General, p. 1596, the question was submitted whether a lumber company whose manager was a member of a board of education, could legally file a bid to sell the board of education building material, it being stated that the member was not a stockholder, had no bonus arrangement and worked on a straight salary basis. The Attorney General 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.”

Section 4757 above referred to was identical in wording with the first paragraph of Section 4834-6 supra.

In an opinion found in 1939 Opinions of the Attorney General, p. 438, my immediate predecessor held as follows:

“Under the provisions of sections 12910 and 12911, General Code, a firm having as one of its officers, minority stockholders and employes, a member of the county board of elections may sell supplies to the state of Ohio, but may not sell supplies to county commissioners, municipalities or boards of education within Ohio, unless such sale comes within the saving clause contained in section 12911, General Code.”

Section 12911 above referred to relates to contracts with a political subdivision with which the officer is *not* connected and excepts contracts made pursuant to public bidding.

Your inquiry does not specifically raise the question as to the criminal liability of the board member, but rather as to the legality of the contract. In addition to the authorities above mentioned, I direct your attention to an opinion found in 1935 Opinions of the Attorney General, p. 898, where the authorities bearing on the validity of a contract made in violation of the statutes above referred to and quoted, are discussed at length. Among others, the then Attorney General quoted from the case of *Doll v. State*, 45 O. S., 449, where Judge Williams used the following language:

“To permit those holding offices of trust or profit to become interested in contracts for the purchase of the 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.*” (Emphasis added.)

The courts of our state have not been quite clear and unanimous in declaring whether a contract made in violation of these statutes is abso-

lutely void, but I think it may safely be stated that they are in all cases regarded as illegal. In the case of *State v. Buttles*, 3 O. S., 309, the court laid down the following rule:

“Contracts contra bonos mores, forbidden by positive law, or opposed to public policy, are void, and can neither be ratified nor enforced; but where a statute prohibits an act under penalty, and that is the only illegality claimed, the whole statute must be examined to ascertain whether the Legislature intended that contracts made in violation of it should be avoided.”

In the case of *Bellaire Goblet Company v. Findlay*, 5 O. C. C., 418, it was held:

“Contracts entered into between a Board of Gas Trustees of a municipality and an incorporated company, when a member of the Board of Gas Trustees is at the same time an officer and personally interested in the incorporated company, are against public policy, and void.”

In the light of these authorities we might well conclude that if the only section involved in the present case was Section 12910, General Code, which is purely a criminal statute, there would at least be a question whether a contract made in disregard of its provisions would be invalidated. However, Section 4834-6 supra, deals directly with contracts made by the board of education, and in my opinion does make a contract made in disregard of its provisions illegal.

Accordingly, in specific answer to your question it is my opinion that where a board of education undertakes to purchase school buses of a dealer whose foreman is a member of such board, such contract is under the terms of Section 4834-6, General Code, an illegal contract.

Respectfully,

HUGH S. JENKINS,  
Attorney General.