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AN ENGINEER EMPLOYED UNDER SECTION 4364 G. C. IS AN OFFICER OF THE MUNICIPALITY—SECTION 3808 G. C. WOULD MAKE IT ILLEGAL FOR HIM TO BE INTERESTED IN THE EXPENDITURE OF MONEY ON THE PART OF THE CORPORATION OTHER THAN HIS FIXED COMPENSATION.

SYLLABUS:

An engineer employed under section 4364 of the General Code is an officer of a village and as such officer section 3808 of the General Code would make it illegal for him to be interested in the expenditure of money on the part of the corporation other than his fixed compensation.

COLUMBUS, OHIO, November 21, 1925.

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

GENTLEMEN:—I am in receipt of your communication as follows:

“Section 4364 of the General Code reads:

“Under the direction of council, the street commissioner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and shall perform such other duties consistent with the nature of his office as council may require.

“Sections 3808, 12910 and 12912 G. C., are pertinent to the subject.

“An ordinance of the village of _____ reads:

“ ‘A resolution providing for the employment of B. T. Wright, as engineer for the village of _____, state of Ohio, for the years 1924 and 1925.

“ ‘BE IT RESOLVED by the council of the village of _____, state of Ohio. Section I. That B. T. Wright, be and he is employed as engineer for said village for the years 1924 and 1925 upon the following terms and conditions.

“ ‘For Water Improvements:

“ ‘Three (3) per cent of the actual cost of construction to cover preparation of all plans, specifications, estimates and profiles, together with the engineering work necessary for the installation of said pavement, sewer, or other contract improvement to their completion.

“ ‘For Inspection:

“ ‘In case inspection is required in connection with water, pavement, sewer or other contract improvement as noted above, an additional two (2) per cent of the actual cost of said improvement shall be paid.

“ ‘For General:

“ ‘Compensation to be made on estimates rendered in favor of the contractor, or for work completed.

“ ‘In the event of miscellaneous work, or when plans, specifications, estimates and profiles are prepared and no further work on said improvement is done, the village shall pay reasonable compensation upon bills duly ren-

dered in accordance with the general practices in use for work of this nature.

"Section II. This resolution shall take effect and be in force immediately after its passage.

"Passed this 3rd day of January, 1924.'

"Contracts for street improvements have been let at competitive bidding by the village of _____ in accordance with the plans and specifications prepared by an engineer employed under authority of the ordinance. All necessary inspections were made and construction approved by such engineer before estimates were paid to contractors. The engineer was paid the compensation provided for his services.

"In addition to such compensation the engineer had a financial interest as a sub-contractor in one or more contracts with the village and on several occasions furnished cinders, other materials and labor to such village for which he received compensation.

"Question 1. In view of the above provisions of the General Code, particularly section 12912, could such engineer legally enter into an agreement to do work for the contractor in connection with a contract let by the village to such contractor?

"Question 2. Is an engineer for the village when employed in the manner described an officer or an employe within the meaning of the above mentioned sections of the General Code, and as such precluded from having an interest in an expenditure of money on the part of the village other than his fixed compensation?"

Section 4364 of the General Code of Ohio pertains to the duties of a street commissioner appointed under section 4363 and further provides that these duties shall be the same for an engineer when one is provided by council.

Section 3808 of the General Code provides as follows:

"No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation. A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom."

It will be noted that this section provides that no member of the council, board, officer or commissioner of the corporation shall have any interest in the expenditure of money on the part of a corporation other than his fixed compensation. For this section to be applicable it will be necessary that we find that an engineer employed under section 4364 of the General Code, is either an officer or commissioner of the corporation.

The term "office" or "officer" has been defined by numerous courts in all jurisdictions and the definitions are so varied that support may be found for almost any proposition relating to the general subject of an office.

In the case of *State ex rel. vs. Hunt*, 84 O. S. page 143, Spear, C. J., on page 149 of the opinion, it is said:

"We have not undertaken to enter the field of definition of the term 'office' or 'officer.' As given in the books they are multitudinous, not to say multifarious. Indeed so varied are they, scattered through the books, that

the ingenious barrister may find a support for almost any proposition relating to the general subject which the necessities of his case may seem to demand. But, like maxims of the law, when used indiscriminately and without judgment, they are apt to mislead. One which seems to have met with most favor, perhaps, is that an office is a public position to which a portion of the sovereignty of the country attaches, and which is exercised for the benefit of the public. And yet, without a satisfactory definition of what is and what is not, the 'sovereignty of the country,' this definition seems to fail to adequately define. Manifestly, however, each case should be decided on its peculiar facts, and involves necessarily a consideration of the legislative intent in framing the particular statute by which the position, whatever it may be, is created. Returning again to the statute, when, its intent and purpose is ascertained, we are nearing a proper answer to the question of office or no office, and if that purpose is not inconsistent with the language used in the act we may confidently assume that our answer is correct."

Following the rule laid down in the above case it will be necessary to examine the sections which authorize the appointment of an engineer to have supervision of the improvement and repair of streets, etc. The only section which seems to authorize the appointment of such an engineer is section 4364, quoted above.

Section 4365, General Code, provides for assistants to such engineer to be employed by the street commissioners in such number as the council may provide. It will be noted that in section 4364 provision is made that the street commissioners or an engineer shall be under the direction of council.

Section 4211 of the General Code provides in part as follows:

"The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title."

As the council may not perform any administrative duties it cannot be said that an engineer appointed under section 4364 is under the direct supervision of any other officer of the municipality. Such officer is exercising in his own right a part of the sovereignty of the country, which power is exercised for the benefit of the public. The duties of the part of the sovereignty exercised by such engineer is the supervision of all improvements and repairs for the purposes mentioned in section 4364.

Section 3808 of the General Code, quoted above, is for the purpose of preventing any officer of a municipal corporation obtaining any financial benefit from such position otherwise than the compensation provided therefor. This section is not a criminal one and therefore the word "officer" as used need not be given the strict construction that would be necessary if it was a criminal section. This section may be found in the chapter relating to taxation and was passed at the same time as the Burns law relating to the city and the purpose of such legislation is apparent from the context.

It is therefore my opinion that an engineer employed under section 4364 of the General Code is an officer of a village and as such officer section 3808 of the General Code would make it illegal for him to be interested in the expenditure of money on the part of the corporation other than his fixed compensation.

Respectfully,

C. C. CRABBE,

Attorney General.