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1. CONTRACTS BETWEEN A MILK COMPANY AND BOARD OF EDUCATION ARE INVALID WHERE SAID MILK COMPANY EMPLOYS TWO MEMBERS OF THE BOARD AS MILK TRUCK DRIVERS—

2. CONTRACT FOR SALE OF SCHOOL BUSES BETWEEN BOARD OF EDUCATION AND AUTO SALES AGENCY ARE INVALID WHEN SAID AGENCY EMPLOYS A MEMBER OF THE BOARD—§3313.33, R.C.

SYLLABUS:

1. Contracts for the sale of milk executed between a board of education and a milk company which employs two members of the board of education as salaried milk truck drivers are invalid, being violative of Section 3313.33, Revised Code.

2. Contracts for sales of school buses executed between a board of education and an automobile sales agency which employs a member of the board of education on a salary basis are invalid, being violative of Section 3313.33, Revised Code.

Columbus, Ohio, August 19, 1961

Hon. Dennis J. Callahan, Prosecuting Attorney
Lawrence County, Ironton, Ohio

Dear Sir:

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

"A situation has been brought to my attention in our county concerning several members of one of the county boards of education, and the question has arisen as to whether or not they are eligible to continue as members of the board concerned. The particular situation is that two of the members of this board of education are employed as milk truck route drivers for a particular milk company, and it is shown in the December 31, 1957 to August 15, 1960, Auditor's Report that these two men voted for this company to furnish all the milk and milk products for the cafeterias in the district. I have signed statements from each of these two board members to the effect that they have no personal interest in the sale of milk in this particular district, but that the chosen company was the low bidder. I further have a written statement from the milk company that both men, although employees of approximately ten years time, do not receive any monetary benefits from the fact that this company sells milk to that particular board.

"As to the third member of the board, this man is employed some ten months out of each year by an automobile sales agency of this county, which during the past few years has sold a number of school busses to this particular school district, more particularly during the year 1960 they sold some \$19,700.00 worth of busses to this district. This man for two months out of the year is employed in a tobacco auction, and he advises me that although he favors the purchase of this particular school bus, he does not receive any compensation of any kind from the sale of busses to the particular board concerned.

"After reading Section 3313.13 of the Revised Code, wherein it is stated that 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, as this particular instance involves the majority of the members of this school board, I would appreciate your advising me as to whether or not the members who are employed by the companies who have business dealings with the board, such as I have herein mentioned, are eligible to serve as board members, and if they are not considered as eligible to serve as board members, what is the proper method of procedure for discharging them and securing new board members."

The question you have raised involves two statutes which deal with the problem of conflicting interests of public officers. Section 3313.33, Revised Code, reads in part 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.

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Section 2919.08, Revised Code, a criminal statute, also pertains to this problem. It reads as follows.

"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."

These two sections concerning conflicting interests of public officers and especially of members of boards of education have received many interpretations from this office and from the courts. The application of these statutes to analogous situations in the past has been uniformly strict. While I will not unduly lengthen this opinion by citing all such holdings, the law was thoroughly reviewed in two opinions of the Attorney General. In Opinion No. 3075, Opinions of the Attorney General for

1948, page 197, this office was called upon to rule on a situation in which a member of a board of education was employed as a salaried foreman by an automobile dealer who sold automobiles to the board. In this opinion the then Attorney General reasoned as follows:

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“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.

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As to the validity of the contract there in question, the Attorney General reached the following conclusion:

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“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, (Section 2919.08, Revised 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, (Section 3313.33, Revised Code), 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.

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(Revised Code citations added)

In Opinion No. 6672, Opinions of the Attorney General for 1956, page 432, one of my predecessors held that a contract between a school supplier and a board of education was invalid where a member of such board was employed by the supplier in a relationship which had no bearing on the school contracts. In this opinion he reasoned as follows:

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“It will thus be seen that the policy of the law as revealed by these several statutes, is to deal very severely with any public officer, including a member of a school board, who allows himself to get into such a position that he has *directly* or *indirectly* any interest in a contract which may be made by the board of which he is a member. * * *

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* * * The question at once arises whether there should be any difference except in degree between the interest which a president on salary would have in building up his company, and an agent or employee who would have no managerial authority.

“In opinion No. 179, Opinions of the Attorney General for 1933, page 214, it was held 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 meaning of Section 3808, General Code, and within the meaning of a charter provision which prohibits an officer of the city from having an interest, direct or indirect, in any contract with the city or from being interested either directly or indirectly in the sale of supplies to the city. In this case, it will be noted that the municipal officer in question was not an officer or manager of the concern selling supplies to the city but merely an employee. In the course of the opinion it was said at page 215:

“ ‘Provisions such as these are merely enunciatory of common law principles. *Nunemacher v. Louisville*, 98 Ky. 384. 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 employee 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 (employe) is a member of the board which makes such contract or authorizes such expenditure on behalf of the city.’ * * *

(Emphasis added)

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“In the first case which you present, you state that the board member in question has no interest whatsoever in the company,

and that he sells business machines for the company on a commission basis; further that he has no authority to sell and does not sell any other supplies of the company and could not sell any business machines to the school board. Your letter, however, does state that this company has in the past done considerable business with said board and is still making contracts of sale which have been approved by the party in question, as a member of the board. I can not see that these extenuating circumstances can change the general rule or avoid the clear policy of the law, or the severity with which it has been applied, as indicated by the authorities above cited.

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“Accordingly, I must apply the rules laid down in the opinions to which I have referred. In the case of the board member who is an employee selling certain articles on commission for a company which has extensive dealings with his board, it would of course be impossible from the facts which you state to trace any actual interest which he might have as a member of the board, in contracts made by his board and with that corporation. However, it must be manifest that a company which deals extensively with a board of education in the sale of school equipment, would certainly be put in a highly advantageous position by having one of its employees on the board of education, and the temptation on the part of that board member to throw all of his influence in favor of the company by which he is employed, would seem almost overpowering. * * *

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As a result of the law reviewed in these opinions, which law remains unchanged, the contracts between the milk company and the board of education are apparently invalid. The same would apply to the contracts for purchase of school buses between the board of education and the automobile sales agency. Whether as a result of approving these contracts the particular board members involved should be removed from office is a question which the voters of this school district or the courts must decide. Section 3.07, Revised Code, provides for forfeiture of office for reasons of misconduct. This is the applicable section of law for removing a member of a board of education. In the case of *In Re Leach*, 19 Ohio Opinions, 263 (1940), a member of a local board of education was removed from office pursuant to these sections for somewhat similar activities. The facts you have presented are not sufficient to warrant any conclusion on my part as to whether the members are guilty of the type of misconduct included in Section 3.07. It may be also that an action

in quo warranto would lie pursuant to Section 2733.01, Revised Code, to oust offending public officers from office.

It is, therefore, my opinion and you are accordingly advised as follows:

1. Contracts for the sale of milk executed between a board of education and a milk company which employs two members of the board of education as salaried milk truck drivers are invalid, being violative of Section 3313.33, Revised Code.

2. Contracts for sales of school buses executed between a board of education and an automobile sales agency which employs a member of the board of education on a salary basis are invalid, being violative of Section 3313.33, Revised Code.

Respectfully,

MARK McELROY

Attorney General