

Note from the Attorney General's Office:

1951 Op. Att'y Gen. No. 51-812 was overruled in part
by 1966 Op. Att'y Gen. No. 66-162.

812

1. CONTRACT—OFFICER OF CITY FORBIDDEN TO MAKE OR PARTICIPATE IN MAKING CONTRACT TO PURCHASE GOODS FROM CORPORATION IN WHICH OFFICER IS STOCKHOLDER—SUCH CONTRACT ILLEGAL AND INVALID—CITY AUDITOR JUSTIFIED IN WITHHOLDING PAYMENTS UNDER SUCH CONTRACT—SECTION 3808 G. C.
2. WHERE CITY PURCHASED GOODS FROM A CORPORATION IN WHICH OFFICER OF CITY IS A STOCKHOLDER, WHERE OFFICER HAD NO PART IN MAKING OR AUTHORIZING CONTRACT AND HAD NO KNOWLEDGE OF CONTRACT, CONTRACT NOT INVALID.
3. WHERE MUNICIPALITY PURCHASED GOODS FROM CORPORATION IN WHICH MUNICIPAL OFFICER IS A STOCKHOLDER—OFFICER SHOULD REFUND TO MUNICIPALITY ANY PROFIT WHICH CAME TO HIM THROUGH THE CONTRACT—AMOUNT MAY BE RECOVERED FROM OFFICER WHETHER OR NOT HE HAD KNOWLEDGE OF CONTRACT.

SYLLABUS:

1. Section 3808, General Code, has the effect of forbidding an officer of a city from making or participating in making a contract whereby the city purchases goods from a corporation in which he is a stockholder. A contract so made is illegal and invalid, and the city auditor is justified in withholding payments under such contract.

2. A contract made on behalf of a city whereby the city purchases goods from a corporation in which an officer of the city is a stockholder, will not be held invalid by reason of the provisions of Section 3808, General Code, where the officer has no part in making or authorizing such contract and has no knowledge thereof.

3. Section 3808, General Code, forbids any officer of a municipality to have any interest in the expenditure of funds of such municipality, and accordingly where such municipality has made a contract of purchase of goods from a corporation in which an officer of such municipality is a stockholder, such officer should refund to the municipality any profit which came to him by reason of such contract, and such amount may be recovered from such officer, whether or not he had knowledge of the making of such contract.

Columbus, Ohio, October 11, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

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

“Re: Interest in Contract—
Section 3808, General Code

“The current examination of the City of M. . . ., disclosed expenditures from the municipal treasury for material and supplies purchased from a local company in which the mayor was and is a stockholder, owning in excess of the amount of stock permissible under the provisions of Section 3808, General Code. After careful investigation the total payments to said local company were determined and a finding rendered against the mayor and company, jointly, for the recovery of the total amount illegally expended from the municipal treasury.

“The mayor of said city has remained in office despite the provisions of Section 3808, General Code, which reads as follows :

* * * A violation of any provision of this section 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 this section, and if in office he shall be dismissed therefrom. * * *

“A number of questions are suggested or have arisen as a result of the condition described. We are familiar with the provisions of Section 4670, et seq., General Code, and the decision of the Supreme Court in the removal proceedings of Jos. Coppola and Geo. Schrum, 155 O. S. page 329, but desire additional information as to a cause for action in the dismissal of municipal officers, how accomplished, and when effective.

“Inasmuch as the situation disclosed by this examination calls for decision as to the present status of said officer, and since similar circumstances and conditions are of frequent occurrence in Ohio municipalities, the correct answer to such related problems is of state-wide interest and importance.

“Therefore, we respectfully request that you give consideration to the following questions and furnish us with your formal opinion in answer thereto :

“1. When it is disclosed that a municipal officer had an interest in certain expenditures which were made by the

municipal corporation contrary to the provisions of section 3808, General Code, what are the steps and proceedings necessary to accomplish the dismissal of such officer?

"2. When the mayor of a city remains in office but discontinues the sale of material and supplies to the municipality with which he is connected, is the city auditor justified in withholding payment of the regular salary provided for such office, or is he required to pay such officer's compensation so long as he is permitted to serve in the position of mayor?

"3. When material vouchers have been presented to the city auditor for payment to a company in which the mayor of said city is a known stockholder in excess of the provisions of Section 3808, General Code, may said claims be lawfully paid, either prior to the resignation or dismissal of such mayor or subsequent thereto?

"4. Section 4290, General Code, provides that the city auditor shall certify the election of certain municipal officers to the Common Pleas Court of the county in which the municipality is located. The Coppola-Schrum case, 155 O. S., 329, indicates that a violation of Section 3808, General Code, disqualifies such person from holding any office of trust or profit in the municipality and that a violation which occurred in a preceding term of office will serve as a bar to disqualify such person from a subsequent term of office to which he may be elected. In view of these facts, and where the mayor is re-elected to office following a violation of the provisions of section 3808, General Code, what are the responsibilities and duty of the city auditor with reference to certifying the election of said mayor pursuant to the authority of Section 4290, General Code."

Section 3808, General Code, to which you refer reads as follows:

"No member of the council or of any board and no officer or commissioner of the municipal 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 section 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 this section, and if in office he shall be dismissed therefrom.

"The provisions of this section shall not apply where a member of the council or of a board or an officer or commissioner of the municipal corporation, being a shareholder of a private corporation but not being an officer or director thereof, owns

not in excess of five per centum of the stock of such private corporation and the value of the stock so owned does not exceed five hundred dollars. *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 municipal corporation an affidavit stating his exact status and connection with said corporation.” (Emphasis added.)

1. Your first question is as to the steps necessary under the law to accomplish the dismissal of a mayor who, it is alleged, had an interest in certain expenditures of a municipal corporation made contrary to the provisions of Section 3808, General Code. I am unable to find in any of the statutes relative to your Bureau any power or authority vested in your Bureau to take any action looking to the dismissal of any public official. Accordingly, I do not deem it necessary to enter into any discussion as to the law relative to such proceedings.

2. Your second question is as to the right and duty of a city auditor, under the law, to withhold payment of the salary of the mayor of a city after alleged purchases have been made by the city from a corporation in which the mayor is a stockholder. While this question appears to involve an inquiry which might more properly be submitted by the city auditor to his legally constituted advisor, the city solicitor, yet I think it proper to call attention to the fact that one who has been duly elected to the office of mayor or other municipal office continues to hold that office and to be entitled to the salary pertaining thereto until some tribunal which has been given authority by law to remove him has exercised that authority and made an order of removal. The city auditor, of course, has no quasi-judicial authority and it is not within his province to determine whether an officer who has been duly elected has for some reason disqualified himself and made himself subject to removal.

Accordingly, it is my opinion that the city auditor has no right to withhold approval of vouchers for the salary of the mayor, as long as he retains that office.

3. Your third question is as to the payment of claims which are presented to the city auditor for payment for materials furnished to the city by a company in which the mayor of such city is a known stockholder.

Section 3808 supra, does not expressly provide that contracts of purchase by a municipality made in violation of its terms, shall be invalid, but the courts have held that such contracts are invalid under the circum-

stances of particular cases. *Goblet Co. v. Findlay*, 5 O.C.C., 418; *Dalzell v. Findlay*, 27 Bull., 128; *State ex rel. v. Funk*, 16 O. C. C., 155; *Marsh v. Hartwell*, 2 O. N. P., 389; *Railroad v. Morris*, 10 O. C. C., 502, affirmed without report, *Morris v. Railroad*, 57 Ohio St., 658.

An examination of these cases, however, will disclose that in every case the contract in question was made directly by the municipal officer and that his interest in the contract was the result of his active participation. In the cases above noted, of *Goblet v. Findlay* and *Dalzell v. Findlay*, one Gorbey, was one of five members of the Board of Gas Trustees of the city and personally took part in making contracts with corporations of which he was an officer, for the sale of gas. The action in each of these cases was by the corporation for an injunction to prevent the city from discontinuing the service, and the court refused such relief on the ground of the personal participation of Gorbey in making the contract.

Likewise, in the case of *Marsh v. Hartwell*, 2 O. N. P., 389, it appeared that Marsh, the village solicitor, purchased an interest in real estate which the village was about to acquire, and the property was then conveyed to the village, subject to a mortgage which the village undertook to assume. In an action to enjoin the village from making payments on the mortgage, the court said:

“Mr. Marsh was interested in this contract, and being solicitor of the village would, if the contract were entered into, be interested in the purchase of property for the village. To allow the village to continue the payment of the dues under the mortgage would be to allow the village to enter into an illegal contract.”

In the case of *Railroad v. Morris*, 10 O. C. C., 502, Morris was the local manager of the railroad company's business, and was also a member of the city council. Having secured for the railroad valuable grants from the city council, he brought suit against the railroad for his compensation, and the court denied his right to recover, holding that his contract was illegal because of his membership in the city council.

I have been able to find no case involving the validity of a contract claimed to be in violation of Section 3808 supra, or relative to the removal of an officer, or a criminal prosecution under Section 12910 of the General Code, where it was not shown that the officer himself had directly made or participated in making the objectionable contract. This leads me to the question as to the effect on such contract and the effect on the officer's

status as an alleged law violator, when the contract is made wholly without his participation and possibly without his knowledge.

In your letter of request you appear to assume that the officer referred to, is guilty of a violation of Section 3808, General Code. There is no detail of the factual situation. I consider it only fair to recall that in a conference held in your office the mayor in question stoutly maintained that whatever purchases were made from the corporation in which he is a stockholder, were made by the director of public service, wholly without his instructions and without his knowledge, and the sales were made by such corporation, entirely without his knowledge. He further stated that none of such purchases were of such amount that they had to be approved by the board of control of which he is by law a member. Furthermore, it should be noted that the director of public service, although appointed by the mayor, is in no sense his servant, and he is not responsible for the director's acts. 30 Ohio Jurisprudence, p. 967; *Cornwell v. Voorhees*, 13 Ohio St., 23.

The same situation which is condemned by Section 3808, to wit, being "interested in a contract," is also the subject of a criminal statute, Section 12910, General Code, which provides:

"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."

If, therefore, we are to assume that every such contract as you mention in your letter, regardless of the innocence of the officer as to participation therein, shall have the effect not only of causing a forfeiture of his office and a permanent disqualification from holding any municipal office, but of subjecting him to a term of from one to ten years in the penitentiary, then we have indeed a very serious situation confronting every municipal officer. If such be the result, any officer of a municipality might find himself unwittingly precipitated into such deep trouble by the act of someone else that no man of any consequence, could safely become a municipal officer either by election or appointment. Furthermore, few business partnerships or corporations would feel safe in dealing with a municipal corporation in any matter of contract, for fear it might be found

that some member of council or some administrative officer had an interest of some kind in the firm or a share of stock in the corporation. For instance, if the city clerk or city auditor had a few shares of stock in a manufacturing corporation and the director of public service acting within his legal authority should purchase some implement from that corporation, then the clerk or auditor would find himself deep in the toils of the law, subject to removal and to criminal prosecution and punishment. Plainly, such an interpretation of the law would lead to extreme absurdity. In view of the severity of the penalties imposed by both of the sections quoted, I believe the law was intended to cover only cases where real guilt is present.

Aside from the consequences to the officer, let us consider what would be the effect as to the validity of the contract made under such circumstances. A corporation entering into a contract in good faith and strictly in accordance with legal procedure, for furnishing material or labor or both to a city, would find its contract invalid and payment for its performance denied, merely because it appeared that some officer who had nothing to do with making the contract, owned some shares of stock in the corporation.

It is my opinion that the law never intended any such consequences to follow, and that the entire effect of both of the statutes which we are considering, if it results in invalidating a contract, must be predicated upon the existence of an intention on the part of the officer in question, to take advantage of his official position, to his own profit. In the case of *In re. Removal of Leach*, 19 Ohio Opinions, 263, it was held :

“2. Statutes for the removal of public officers are to be strictly construed, and before the court may grant a petition for the removal of an official the evidence of the acts and grounds for removal must be clear and convincing.”

In support of that proposition the court cited *In re. Stunhall*, 28 O. L. A., 635, and *In re. Diehl*, 47 Oh. App., 17, affirmed 128 Ohio St., 212. In the opinion in the *Leach* case, it appears very clearly that *Leach* not only sold coal from a mine in which he had an interest, to the school board of which he was a member, but that he personally participated in unloading the coal and making out the bills. The court found other facts in the case which indicated that he was attempting to conceal his interest in the firm which owned the mines; these facts, the court said, indicated that he had an interest in the contract.

My conclusion that the legislature did not intend to make the severe penalties of Section 3808 supra and its kindred Section 12910 apply to an officer except in case of his deliberate act, is strengthened by the last sentence of Section 3808:

“If a stockholder desires to avail himself of the exception provided in this section, before entering into such contract, such person shall first file * * *”.

This privilege could not possibly apply to one who was not active in making such contract, and had no knowledge of it.

It is my opinion, therefore, that the question whether a contract is rendered illegal because an officer of a municipality has an interest in the expenditure of money on the part of the corporation, within the meaning of Section 3808, General Code, depends upon the question of fact as to whether such officer personally participates in the making of the contract or sanctions or directs the same to be made, and in the absence of such participation or authorization such contract would not necessarily be invalid, and payments due thereunder should be made in accordance with the terms of the contract. However, the officer should not profit by reason of such contract, even if he is an innocent party to the matter; and if he finds himself in such situation, he should in good conscience make prompt restitution of any such profit; failing to do so, he would be subject to an action to recover. The case of *Wright v. Clark*, 119 Ohio St., 462, was one in which a village engineer had furnished to the village a large amount of materials in small lots and had been paid therefor. In approving a judgment for recovery, the court said:

“It was not determined in the courts below—neither do we determine in this court—that unreasonable profits or fraud entered into these transactions. We have, however, carefully scrutinized this record to learn how Mr. Wright handled the work of the village of Bedford in those transactions where he was an interested party, and, while we assume that no actual fraud was practiced, it is plain that if every municipality followed the same course the temptations to fraud would be enormously increased. Unreasonable profits, actual fraud, conspiracy, and graft are not essential elements of this statutory inhibition. The Legislature has in sweeping language forbidden any of its officials from having any interest in the expenditure of money on the part of the corporation, other than fixed compensation, and has made that provision effective by the recovery of all sums of money or other things he might receive contrary to such provisions. Wright

will be presumed to have had knowledge of that statute, and he therefore made contracts with the village at his peril.”

In that case, Wright was the active party in making the sales. However, I am of the opinion that from the standpoint of public policy, the principle should apply as well to a case where the officer had no connection with the contract, but was the unconscious beneficiary.

4. Your fourth question, as to the duty of the city auditor to certify to the common pleas court of the county in which a municipality is situated, the reelection of a mayor who is alleged to have violated the provisions of Section 3808, General Code, calls for substantially the same answer as given to your second question. Section 4290, General Code, requires the city auditor to certify the election of every officer of the corporation having power to discharge the duties of a justice of the peace. Since, as already pointed out, the city auditor is not endowed by law with any judicial power, he has no right to pass on the guilt or innocence of any officer, and in the case you present he should accept the certificate of the election authorities, and certify to the court of common pleas the name of the person who has been duly elected as mayor.

Respectfully,

C. WILLIAM O'NEILL

Attorney General