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1. PUBLIC AFFAIRS OF VILLAGE—MEMBER, BOARD OF TRUSTEES — SECTION 733.78 RC — INTEREST OTHER THAN FIXED COMPENSATION IN EXPENDITURE OF MONEY.
2. PROVISIONS OF SECTION 735.09 RC DO NOT CONFLICT WITH REPEAL OR MODIFY PROVISIONS OF SECTION 733.78 RC—AUTHORITY, DIRECTOR OF PUBLIC SERVICE —INTEREST IN ANY CONTRACT.

SYLLABUS:

1. The provisions of Section 733.78 of the Revised Code apply to a member of a board of trustees of public affairs of a village.
2. The provisions of Section 735.09 of the Revised Code do not in any way conflict with, repeal or modify the provisions of Section 733.78 of the Revised Code.

Columbus, Ohio, May 26, 1955

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen :

I have before me your communication enclosing a letter from Hon. Gale B. Weller, Prosecuting Attorney of Morrow County, in which he raises certain questions as to the amenability of a member of the board of public affairs in a village who was interested in the sale of a motor vehicle to said village, to the provisions of Sections 733.78 or 735.09, of the Revised Code of Ohio. It appears from the letter of the prosecutor that a member of the board of public affairs, in response to an advertisement for bids published by the village council for the purchase of a motor vehicle, submitted a bid for the sale of the motor vehicle and was awarded the contract, and that the contract was performed.

Section 733.78 of the Revised Code, provides in part as follows :

*“No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation. Any person who violates this section shall be disqualified from holding any office of trust or profit in the municipal corporation, and shall be liable to the municipal corporation for all sums of money or other things received by him, in violation of this section, and if in office he shall be dismissed therefrom. * * *.”* (Emphasis added.)

This is not a penal statute providing any fine or imprisonment for its violation, but it does impose a penalty by disqualifying the offending officer from holding any office of trust or profit in the municipal corporation, and imposes a personal liability on such officer for all sums of money or other things received by him in violation thereof. It further provides that he shall be dismissed from his office.

Reference is made to Section 735.28 and Section 735.29 of the Revised Code, the first of which provides for the election of a village board of public affairs. The second gives such board the same powers and duties as are provided for in the statutes governing the powers and duties of the director of public service in a city. The suggestion in the prosecutor's communication appears to be that the members of the board of public affairs

are restrained from having an interest in the contract by Section 735.09, Revised Code, and are not subject to the provisions and penalties of Section 733.78 *supra*. This is on the theory that Section 735.09 is a special statute and would prevail over Section 733.78. Section 735.09 reads as follows:

“All contracts made by the director of public service shall be executed by him in the name of the city, one copy of which shall be filed in his office and one with the city auditor. No liability shall be created against the city as to any matters under the supervision of such director except by his express authority. No director of public service or officer or employee of his department shall be interested in any contract under his supervision.”

Waiving the doubt whether this section does include the members of the board of public affairs, it will be observed that this section relates rather to the proper execution of the *contract* and does not suggest any penalty or disqualification against the *director* as does Section 733.78. The only effect of Section 735.09 would appear to be to lead to the invalidation of a contract made in violation of its provision forbidding a director of public service or any officer or employee of his department from being interested in the contract. On the contrary, Section 733.78 *supra*, has for its sole purpose the prohibition against *any* officer of any municipal corporation having an interest in a contract with the municipality and the imposition upon him of the penalty of peremptory discharge from his office and a permanent disqualification from holding any office of trust or profit in the corporation, and further a personal liability for all money received by him in violation of law.

Plainly there is no possible ground for the application of the rule that a special statute governing a given matter shall prevail over a general statute. That rule presupposes that there is an irreconcilable inconsistency between the two statutes, in which case the special, if it is later in enactment, may operate as a total or partial repeal of the earlier general statute. In 27 Ohio Jurisprudence, p. 407, it is stated in these words:

“It is well settled that a special law repeals an *earlier general law* to the extent of any irreconcilable conflict between their provisions; or, speaking more accurately, it operates to engraft on the general statute an exception to the extent of the conflict. But such a construction should be applied with caution, and, to have that effect, the subsequent special act should be plainly irreconcilable with the provisions of the prior general law; if the two acts are not repugnant and effect may be given to both, no repeal by implication will result. * * *” (Emphasis added.)

In this case there is no inconsistency, and as a matter of precedence, the general statute, Section 733.78 was enacted in its present language at a later period, 119 Ohio Laws, 763, than the enactment of the "special" statute, 99 Ohio Laws, 563.

Reference is made to my opinion No. 580, Opinions of the Attorney General for 1951, p. 342. That opinion related to the provisions of Sections 12910 and 12911 of the General Code, now Sections 2919.08 and 2919.09 of the Revised Code. Section 2919.08, which would apply to the situation which you present, 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."

It was held in that opinion that because those sections, which are penal sections, in terms imposed a penalty against any person holding an office of trust or profit, from being interested in a contract for the purchase of *property, supplies or fire insurance*, and nothing else, their provisions could not be extended to other contracts. That was an application of the familiar axiom "*expressio unius est exclusio alterius*."

I believe that holding constituted a sound statement of the law but I do not see that it has any bearing whatsoever on the question which you present. We are here dealing with a statute which unequivocally forbids any officer of a municipal corporation from having any interest in any contract involving expenditure of municipal funds.

Accordingly, in specific answer to the questions you have submitted, it is my opinion :

1. The provisions of Section 733.78 of the Revised Code apply to a member of a board of trustees of public affairs of a village.
2. The provisions of Section 735.09 of the Revised Code do not in any way conflict with, repeal or modify the provisions of Section 733.78 of the Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General