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3. BOARD OF ELECTIONS—CONTRACT FOR PRINTING BALLOTS—CONTRACT CAN NOT BE RESCINDED IF BALLOTS ACCEPTED AND USED—TO RECOVER MONEY—SHOWING MUST BE MADE CONTRACT FRAUDULENT OR IN VIOLATION OF STATUTORY PROHIBITION—SECTION 4785-114 G. C.

SYLLABUS:

1. A corporation, in which a principal stockholder is an employe of the Auditor of State, may enter into a contract with a board of elections for the printing of ballots pursuant to the provisions of Section 4785-114, General Code, without said employe violating the provisions of Sections 12910 or 12911, General Code.

2. A corporation, in which a principal stockholder is an employe of the Auditor of State, may lawfully enter into a contract with a board of elections for the printing of ballots pursuant to the provisions of Section 4785-114, General Code, unless said employe, in the performance of his official duties, exercises some of the Auditor's duties as chief inspector and supervisor of public offices or exercises some of the Auditor's administrative duties over the Bureau of Inspection.

3. When a board of elections has entered into a contract for the printing of ballots pursuant to the provisions of Section 4785-114, General Code, and has accepted and used such ballots, the contract can be rescinded and the money recovered only upon a showing that the contract was made fraudulently or in violation of a specific statutory prohibition.

Columbus, Ohio, July 28, 1952

Hon. Forrest E. Sidener, Jr., Prosecuting Attorney
Madison County, London, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Previous to the May 1952 primaries the Madison County Board of Elections awarded the contract for the printing of ballots for Madison County to the D. Press, Inc.; which corporation was the low bidder therefore. The ballots were supplied as per the contract and paid for.

"One of the stockholders of the D. Press, Inc. at the time of the award was, at that time, also an employe of the State Auditor's office.

"The question has been asked of me as to whether or not the contract was legal and valid in view of the employment of the aforesaid stockholder.

"I am unable to find any authority pro or con that is relative to the problem other than your Opinion No. 924 rendered on November 13, 1951 in answer to a request by Hon. Herbert D. Defenbacher, Director of Finance for the State of Ohio.

"I refer you to pages three (3) and four (4) of the unbound copy of the opinion and starting with the third paragraph on page three (3), I respectfully request a clarification of that part of your Opinion in its application to the facts set out in the herein request."

At the outset it would be appropriate to review the statutory provisions dealing with the printing of ballots by a board of elections. In this connection Section 4785-114, General Code, provides in part:

"The contract for the printing of the ballots shall not be let until after ten days' notice * * *. Each bid for such printing must be accompanied by a bond * * *. The contract shall be let to the lowest responsible bidder in the county, provided, however, that all ballots shall be printed within the state."

Section 4785-20, General Code, provides that "expenses of the board * * * shall be paid from the county treasury, in pursuance of appropriations by the county commissioners," and that "payments shall be made upon vouchers of the board * * * upon warrants of the auditor."

So the situation which you have presented is one in which a county has contracted, pursuant to competitive bids submitted according to law, to spend county funds for certain supplies. Does the fact that the successful bidder was an employe of the State Auditor render his contract void?

There are two criminal statutes which are applied in this general field, but a cursory examination of their provisions shows that they do not apply here. Section 12910, General Code, prevents an officer or his employe from contracting with a subdivision with which such officer is connected. No such situation is presented here. Section 12911, General Code, prevents an officer or his employe from contracting with a subdivision with which such officer is *not* connected, "unless such contract is let on bids duly advertised as provided by law." Since there was advertising and competitive bidding in the case which you have presented, I can find no violation of Section 12911, General Code.

You have referred to my Opinion 924, rendered November 13, 1951, and its possible application to this problem. The holding of that opinion, as indicated by the syllabus, was as follows:

"1. A corporation, in which a principal stockholder is a member of the General Assembly, may not enter into a contract to perform any of the state printing designated by Section 754, General Code.

"2. A corporation, in which a principal stockholder is an agent of the Auditor of State, may not enter into a contract to perform any of the state printing designated by Section 754, General Code."

The basis of the opinion, so far as it concerned an agent of the Auditor of State, is found in the following language set out at page 4 of the unbound copy:

"The second person covered by your request is X, who you say is 'an employe of the State Auditor's office.' You do not set out the nature of his duties in that office, and for the purposes of this opinion, I will assume that he performs some of the duties involving the discretion with which the auditor is invested as a public officer. In other words, I must assume that X stands in the place of his principal in the performance of his official duties.

"It is my opinion that an examination of Section 243, General Code, reveals a conflict of interest which prohibits X from holding a contract with the state. That section provides as follows:

"The auditor of state shall examine each voucher presented to him, or claim for salary of an officer or employe of the state, or per diem and transportation of the commands of the national guard, or sundry claim allowed and appropriated for by the general assembly, and if he finds it to be a valid claim against the state and legally due, and that there is money in the state treasury duly appropriated to pay it and that all requirements of law have been complied with, he shall issue thereon a warrant on the treasurer of state for the amount found due, and file and preserve the invoice in his office. He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

"One of the duties of the Auditor under this section is to satisfy himself that work performed and supplies furnished for the state are according to specification and in the quantities actually charged for. That duty could not be performed in the best interest of the public if it were performed by an agent of the Auditor who had himself furnished the labor and supplies. * * *"

Do those principles apply to the question which you have presented?

As pointed out above, the funds here involved were county funds and the Auditor of State has no duty under Section 243, General Code, to check on their expenditure. That duty rests generally with the county auditor and the county commissioners under the provisions of Section 2570, General Code, and with the county auditor and the board of elections in the purchase of ballots, Sections 4785-20, General Code. However, the Auditor of State does have other duties in connection with county funds. Section 274, et seq., General Code, creates the Bureau of Inspection and Supervision of Public Offices in the Department of Auditor of State. "By virtue of his office the Auditor of State shall be chief inspector and supervisor of public offices." Section 284, General Code, provides in part as follows:

"The bureau of inspection and supervision of public offices, shall examine each public office. * * * On examination, inquiry shall be made into the methods, accuracy and legality of the accounts, records, files and reports of the office, whether the laws,

ordinances and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with."

Section 4785-114, *supra*, sets up certain requirements which must be met before the contract for printing ballots can be let. The duty of checking to see that those requirements have been properly observed by the responsible county officials rests in part with the Auditor of State, under the provisions of Section 284, *supra*. It is my opinion that such a duty could not be performed in the best interests of the public if it were performed by an agent of the Auditor who had himself entered into the contract. From this it follows that such an agent would be disqualified from entering into such public contract.

Your request referred only to "an employee of the State Auditor's office," and you did not specify the nature of that employe's duties. The reasoning set out above must be understood to apply only to the Auditor himself or to an employe of his office who exercises some of the Auditor's duties as chief inspector or some of his general administrative duties over the Bureau of Inspection. The facts as to the employe's duties cannot be determined by this office.

All public officials and public employes are under a solemn obligation to keep their public and private business affairs circumspect and above even the remotest suspicion of impropriety and not to commingle the two for their own private advantage. Only in this way can we hope to build among our people, the faith in our system of government that will enable it to endure against threats from its enemies, whether at home or abroad.

One other question should be discussed. My Opinion 924, *supra*, was rendered in answer to a question by the State Purchasing Agent, asking whether he properly could enter into certain contracts. I advised him that he could not, on the ground that I found such proposed contracts to be against a sound public policy. In reaching this conclusion I drew an analogy between the familiar doctrine of incompatibility of public offices and the incompatibility of a public office and a public contract.

Even assuming that the employe in question were found to stand in the place of the Auditor, the case which you have presented is somewhat different. Here the contract has been entered into and the supplies

have been used. Such a situation is analogous to one in which a person has held two incompatible offices, has performed the duties of both, and has been paid both salaries. A judgment of ouster from one of such offices does not mean that salary previously paid in connection with that office can be recovered. The general rule is stated in 43 American Jurisprudence, Public Officers, p. 239, Section 491, as follows:

“The courts are agreed that in the absence of statutory permission, salary which has been paid a de facto officer cannot be recovered by the public authorities, at least where, acting in good faith, he actually rendered the services for which he was paid. * * *”

Applying that principle to the present case, the fact that I might have advised the board of elections not to enter into the contract does not, without more, render the contract void or entitle the county to recover its money. Such a recovery could be made only upon a showing of actual fraud in the making of the contract.

Respectfully,

C. WILLIAM O'NEILL

Attorney General