

2883.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY—
\$20,000.00.

COLUMBUS, OHIO, July 2, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2884.

BOARD OF HEALTH—APPOINTMENT OF HEALTH COMMISSIONER
EXTENDING BEYOND TERM OF BOARD—PECUNIARY INTEREST
BY PUBLIC OFFICIAL IN CONTRACT.

SYLLABUS:

1. *In the absence of statute controlling the matter, an appointment of an officer or employee, or a contract for personal services made by a public officer or board, when the duties of the appointee or the services contracted for involve supervision by the appointing or contracting power, other than the appointment or employment of superintendents and teachers in the public schools, which appointment or contract is for a period extending beyond the official life of the appointing or contracting power, or where such action is taken for the purpose of forestalling the action of his or its successor, in the premises, is invalid.*

2. *Where a statute authorizes the appointment of officers or employees for a period of time "not exceeding" or "not to exceed" or "no longer than" a prescribed period, it impliedly authorizes appointments to be made for terms within that prescribed period, and appointments may lawfully be made for such periods of time regardless of whether or not such periods of time will extend beyond the official life of the appointing power.*

3. *A contract made by a public officer, in the emoluments of which he is personally interested, is against public policy, and for that reason, void.*

COLUMBUS, OHIO, July 3, 1934.

HON. CARLOS M. RIECKER, *Prosecuting Attorney, McConnelville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Some of the members of our local health board have asked me to write you for the following opinion on two questions which are now at issue with this board:

Section 1261-18-19 G. C. provides for the District Advisory Counsel, and also the appointment of the five members for the District Board. It also provides the time and manner in which certain appointments shall be made and specifies times for certain meetings of these two boards. Our District Advisory Board met a few months ago, which

was their first meeting since the year 1925, and at that time they appointed five new members of the District Health Board.

The members who were acting under the old Health Board time had expired, but they were holding over until the new ones were appointed and qualified. During the month of December, 1933, the old Health Board employed a local Doctor as Health Commissioner for the district for a period of one year. The new board feels that they want to make a new appointment of a Health Commissioner and they feel that the appointment made by the old board last December is of no effect because the old board had no power to hire a Health Commissioner to extend over and beyond the period of their existence.

Can this Health Commissioner, who was employed last December for a period of one year, continue to act in such capacity for the period of his contract?

The second question arising in the local Health Board is as follows:

The Health Commissioner who was appointed is in partners with one of the members who was on the District Health Board and it was his vote that decided the issue whether the present health commissioners should be hired or another physician of this county. Some of the members of the Health Board feel that if these two men are sharing in the profits as partners do, the Health Commissioner's contract would be null and void.

The board has stated that they would do nothing further until they received an opinion from your office."

Pertinent to your inquiry are Sections 1261-16, 1261-17, 1261-18, 1261-19 and 4406 of the General Code of Ohio. Sections 1261-16, 1261-17, 1261-18 and 1261-19 read in part, as follows:

"Sec. 1261-16. For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act (G. C. §§1261-16 et seq.) shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. * *

"Sec. 1261-17. In each general health district, except in a district formed by the union of a general health district and a city health district, there shall be a district board of health consisting of five members to be appointed as hereinafter provided and as provided in section 4406 of the General Code. * * A vacancy in the membership of the board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term."

"Sec. 1261-18. Within sixty days after this act (G. C. §§1261-16 et seq.) shall take effect the mayor of each municipality not constituting a city health district and the chairman of the trustees of each township in a general health district shall meet at the county seat and shall organize by selecting a chairman and a secretary. Such organization shall be known as the district advisory council. The district advisory council shall proceed to select and appoint a district board of health as hereinbefore provided, having due regard to the equal representation of all

parts of the district. * * Annually thereafter the district advisory council shall meet on the first Monday in May for the purpose of electing its officers and a member of the district board of health and shall also receive and consider the annual or special reports of the district board of health and make recommendation to the district board of health or to the state department of health in regard to matters for the betterment of health and sanitation within the district or for needed legislation."

"Sec. 1261-19. Within thirty days after the appointment of the members of the district board of health in a general health district, they shall organize by selecting one of the members as president and another member as president pro tempore. The district board of health shall appoint a district health commissioner upon such terms, and for such period of time, not exceeding two years, as may be prescribed by the district board. Said appointee shall be a licensed physician and shall be secretary of the board and shall devote such time to the duties of his office as may be fixed by contract with the district board of health."

"Sec. 4406. The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year."

In the absence of statute modifying or controlling the matter, it is the rule in most jurisdictions, except as to the employment of superintendents and teachers in the public schools by boards of education, that where a public board or officer appoints an employe or officer or contracts for services and the duties of the appointee or contractee are such as involve supervision by the appointing power or officer, such appointment or contract for a period extending beyond the life of the appointing power is not valid. In a number of jurisdictions, however, the rule is otherwise. See 70 A. L. R., 799 and 802 note.

In Ohio the law on this point has never been satisfactorily settled by court decision. The only reported case directly involving the question is the case of *Franklin County vs. Ranck*, 9 O. C. C., 301. In that case there was involved the validity of a contract for the employment of a janitor for a county court house for a period of one year the contract having been made by the board of county commissioners on the day preceding the expiration of the term of one of the members of the board. The court said:

"In the absence of some necessity or special circumstances showing that the public good required it, such a contract as the one under consideration, made by an expiring board, and which has the effect to foreclose the actions of its successor for a year, is not only evidence of unseemly conduct on the part of the members of the board, but, in its object, operation and tendency, is calculated to be prejudicial to the public interests and against public policy and void." See also *State ex rel. Attorney General vs. Thompson*, 9 O. C. C., 161.

In the above case, however, the language of the court in its opinion strongly implies that if it had appeared that the contract had been necessary and had been

made in good faith in the interest of the public and for a term reasonable under the circumstances, it would have been upheld. The court said with respect to this matter:

"The contract was made on Saturday, the last working day of the board. On the following Monday the new board came into existence. No necessity of an employment for a year is shown. Indeed, it is conceded by the pleadings that the employment is unnecessary and a contract made under such circumstances and for such a length of time, is strong evidence, to say the least, that the only object in making the contract was to forestall the action of the new board. We, therefore, hold that the contract is void, as against public policy."

Circumstances similar to those that prompted the court to hold invalid the appointment of the court house janitor in the Franklin County case *supra*, do not exist with respect to the appointment of the health commissioner by the board of health referred to in your inquiry. So far as appears it was necessary to appoint a health commissioner for some time at least. At any rate the non-necessity for such an appointment does not appear. I assume that the term of employment of the former health commissioner had expired, else there would not have been one employed at the time the employment here under consideration was effected. Nor does it appear that this appointment was made to forestall the action of a succeeding board. Although each of the acting members of the board of health was holding over for at least three years, in December, 1933, which they no doubt knew, no facts are stated in your inquiry that would advise the members of the board in December, 1933, that they were to be succeeded in the early part of 1934 by a new board. Neither is the term for which the health commissioner was employed an unusually long term, in fact not as long as the statute authorized such an appointment. The statute provides:

"The district board of health shall appoint a district commissioner upon such terms, and for such period of time *not exceeding two years*, as may be prescribed by the district board of health." (Sec. 1261-19, *supra*.) (Italics ours.)

The above statute clearly authorizes the appointment of a district health commissioner for a period of time as long as two years and that fact alone, shows that the legislature did not intend the rule that the appointment of a district health commissioner could not be made for a term extending beyond the life of the board to apply, as the life of a district board of health is only one year, if the law is carried out according to its terms.

If the law is followed, the appointment of one member of a district board of health is made each year. (Sections 1261-18 and 4406, *supra*.) In this way a new board comes into existence each year, and obviously, if an appointment of a health commissioner is made for two years, as the law permits, his term will extend beyond the life of the board making the appointment. The acting board of health in December, 1933, was possessed of all the power that the statutes accord to a board of health in a general health district. Although at the time it was composed of members who were holding over the five year term for which they had been appointed, that fact did not militate against their power. The

time they held over after five years was as much a part of their term as the time within the five years. The statute, Section 4406, *supra*, expressly provides:

“The term of office of the members of the board shall be five years from the date of appointment and until their successors are appointed and qualified.”

Under the circumstances, I am of the opinion that the appointment in question is not invalid for the reason that it is made for a term which extended into the term of a succeeding board of health.

I come now to the question of whether or not the fact that the person who was appointed health commissioner in December, 1933, was a partner of one of the members of the board of health which made the appointment, renders the appointment void.

Although the statutes do not expressly provide that no member of a board of health may be interested directly or indirectly in contracts made by the board, as they do with respect to members of boards of education and boards of county commissioners and certain other public officers, it is a principle of common law that a public office is a public trust and can not lawfully be administered for the personal profit of the incumbent. In the case of *Goblet Co. vs. Findlay*, 5 O. C. C., 418, it is held:

“Contracts entered into between a board of gas trustees of a municipality and an incorporated company, where a member of the board of gas trustees is at the same time an officer and personally interested in the incorporated company are against public policy and void.”

In the case of *State ex rel. Taylor vs. Penney*, 13 O. D., N. P., 210, it is held:

“Public policy requires that an agent shall not deal with or for himself directly or indirectly, and renders contracts so made voidable as against his principal. This principle is applicable alike to private agents and public officials who are the agents of the public and the latter will not be permitted to put themselves in a position antagonistic to the public interest which they represent and which it is their duty to protect.”

In Volume 46 of *Corpus Juris*, at page 1037, it is said:

“A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members * *.”

In *Ruling Case Law*, Vol. 22, page 460, it is said:

“A contract made by a public officer is against public policy and void, if it interferes with the unbiased discharge of his duty to the

public * * and the question of the validity of such a contract does not depend on the circumstances whether it can be shown that the public has actually suffered any detriment or loss. It is also a well settled rule that a public officer cannot lawfully, on behalf of the public which he represents, contract with himself personally for the performance of services. * * These principles have been applied to contracts by members of municipal boards with such boards, to the effect that a member of the common council of a village cannot lawfully enter into a contract with the village for his own benefit where the contract depends on authority derived from a vote of such council. Such a contract is void on the ground that it is against public policy to allow a member of a board or council to place himself in a position antagonistic to his duty and obtain a contract for himself from the group of which he is a member."

If, as a matter of fact, as you state, the health commissioner who was appointed in December of 1933, was at the time in partnership with one of the members of the board that appointed him and that member shared in the emoluments of the position to which the health commissioner was appointed, I am of the opinion that the appointment was illegal and void and that the present board of health may now lawfully appoint a health commissioner for the district for a term of not more than two years.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2885.

APPROVAL—CONTRACT BETWEEN STATE OF OHIO AND THE
SPOHN PLUMBING COMPANY FOR THE CONSTRUCTION AND
COMPLETION OF A PROJECT KNOWN AS AN ADDITION TO
MACK HALL OF OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, July 3, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Board of Trustees of Ohio State University, Columbus, Ohio, and the W. H. Spohn Plumbing Company, Columbus, Ohio. This contract covers the construction and completion of Plumbing Contract (Item XVIII, together with Alternate No. 1) for a project known as Addition to Mack Hall on the campus of Ohio State University, in accordance with the form of proposal dated June 6, 1934. Said contract calls for an expenditure of nine thousand seven hundred and forty-three dollars (\$9,743.00).

You have submitted the certificate of the Auditor of State showing that there are available moneys from the special trust fund for Dormitory purposes of Ohio State University, which moneys when supplemented by the moneys from the federal government, will be sufficient to cover the cost of erection of the improvement.