

1649.

INCOMPATIBILITY—TREASURER OF VILLAGE ALSO CASHIER OF BANK WHICH HOLDS INACTIVE FUNDS UNDER DEPOSITORY CONTRACT—BIDDING—ACTIVE FUNDS.

SYLLABUS:

1. *No violation of Section 12912, General Code, is effected where a village treasurer serves as assistant cashier of a bank which becomes a depository for inactive funds of the village as the requirements for such contracts under Section 2296-1, et seq., General Code, include competitive bidding.*

2. *Where a village treasurer serves as assistant cashier of a bank which becomes a depository for active funds of the village, a violation of Section 12912, General Code, is effected.*

COLUMBUS, OHIO, December 17, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge your recent communication requesting an opinion from this office as follows:

“Is the office of the Village Treasurer compatible with the office of Assistant Cashier of the bank which is the depository of the public funds of the village?”

The general rules which have developed regarding incompatibility of offices are not as such involved in the situation presented by your letter, since the question of incompatibility of offices usually arises where public offices or those involving a public trust are concerned. The assistant cashier of a bank is not a public officer. His position is solely a matter of private employment and it therefore follows that where one person serves as assistant cashier and village treasurer, no issue as to incompatibility of public offices is created by such service.

There is, however, a question as to whether or not there is a violation of the statutes prohibiting interest of a public officer in certain contracts where the village treasurer serves as cashier of a bank which becomes a depository for funds of the sub-division of which he is an officer. Sections 12910 and 12912 of the General Code refer specifically to the public officer in question.

Section 12910, General Code, briefly stated, prohibits any one holding an office of trust or profit by election or appointment “from

being interested in contracts for the purchase of property, supplies or fire insurance" for the use of any subdivision or public institution with which he is connected. As the case before us does not involve property, supplies or fire insurance, Section 12910, General Code, has no application to the circumstances presented.

Section 12912, General Code, provides:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, *is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office,* shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office." (Italics the writer's.)

The question now resolves itself into a determination of whether or not a village treasurer who serves as assistant cashier of a bank which is the depository of village funds is in violation of Section 12912, *supra*, "an officer of a municipal corporation having an interest in the profits of a contract, job, work or services," or is an officer who "becomes an employe of the contractor of such contract, job, work, or services while in office."

In order to determine the relation to the contract and the interest, if any, in its profits of this officer, the duties of the village treasurer as to depository contracts and the regulations under which such contracts are made will be considered.

Section 2296-1, *et seq.*, provides the conditions and procedure in making depository contracts for public funds. The sections in question will not be quoted because of their length. A careful study of them, however, will reveal the treasurer's duties are purely ministerial and that the selection and discretion as to choosing banks and designating the amounts to be deposited are primarily vested in and exercised by the governing board of the subdivision which is in the case of a village the village council.

Moreover, under the new depository law, contracts for inactive funds and active funds are made separately. Banks must make application to the governing boards to serve as depositories, and in the case of inactive deposits, advertisement is made and bids for the con-

tracts are invited (Sections 2296-7, 2296-8, 2296-9, G. C.). As to active deposits, applications are likewise required and the meeting of conditions set forth by statutes. After this the selection of banks and the designation of amounts are made by the governing boards (Section 2296-10, G. C.). Thus, it can be seen, the village treasurer as such has no discretion or authority in the making of public contracts.

In deciding whether or not the treasurer by being the cashier of a bank which is a public depository has an interest in the profits of a contract or services within the provisions of Section 12912, General Code, the case of *Richardson vs. Trustees*, 6 N. P. (N. S.) 505, must be considered. In this case certain township trustees sought to deposit funds in a bank where one trustee was a stockholder and director. This was held to be legal and not in violation of a statute then in force which prohibited interest of the officials in question in contracts much in the same manner as Section 12912, supra.

The Richardson case has been accepted as authority supporting the rule that Section 12912, supra, does not apply where contracts designating a public depository are made after competitive bidding. This holding has been cited and affirmed by opinions from this office. (1912 O. A. G., Vol. II, p. 1246; 1927 O. A. G., Vol. IV, p. 2585.)

The syllabus of the 1927 opinion reads as follows:

“A village council may select and use a local bank as a depository even though one or more members of the village council are also members of the board of directors of such bank.”

The 1927 opinion cited supra seemed to turn upon the reasoning in an opinion of the Attorney General for 1906, page 287. In that case a member of the board of education was cashier and stockholder of one bank. Another member was assistant cashier and stockholder of a second bank and a third member was an assistant cashier of a third bank. The then Attorney General held that if the Code Section preventing any member of a board of education from having pecuniary interest, directly or indirectly, in any contract of the board were applied, it would render voidable all contracts between a bank and a school board where there was a single member who was a stockholder, regardless of whether his vote was necessary to pass the resolution. Such a rule would render two or three banks of a district ineligible and as a necessary consequence, would prevent the letting of a contract to the third bank unless banks outside the district were permitted to bid, since if only one bank was eligible, there could be no competitive bidding.

While the 1927 opinion considered the matter of competitive bidding, the syllabus did not include any statement as to competitive bidding.

The opinion cited and others dealing with similar circumstances have been based upon the fact that the law requiring competitive bidding prevents any discretionary action by the boards or officials concerned, and that contracts made under such a law go automatically to the highest bidder, thus curbing the danger of abuse of discretion and use of personal influence by public officials who had a direct or indirect interest in the bank concerned. "Such contracts" these opinions held, "were never intended to come within Section 12912, General Code."

A recent opinion of the Attorney General further confirms this rule. (1933 O. A. G., Vol. III, p. 1785). The syllabi of that opinion read:—

"1. Boards of county commissioners, boards of township trustees and boards of education, authorized by statute to create depositories only by competitive bidding, may legally enter into a depository contract with a bank having as stockholders and directors one or more members of the board of the contracting political subdivision.

2. The board of education of a school district containing less than two banks is prohibited by Section 4757, General Code, from entering into a depository contract with a bank of which one or more members of the board are stockholders and directors, since Section 7607, General Code, authorizing the creation of such depository, does not provide for competitive bidding."

The first syllabus speaks for itself. However, the second syllabus must be read in the light of special circumstances. The situation dealt with presented a case where there was only one bank in a district and a statute providing special procedure for such an event was applicable. The distinction drawn revealed that under Section 7607, of the General Code, the board of education of a school district where there was only one bank, was invested with a discretion in selecting a bank which it did not have when there was competitive bidding between banks. This being true, the matter came clearly within the provisions of Section 4757, General Code, a section relating to boards of education which prohibited members of a board from having a pecuniary interest, directly or indirectly.

To state the matter more concisely, where a board or officer of a public subdivision has discretion in selecting a bank which is to serve

as public depository, the statutes prohibiting interest of such board members and public officials are strictly applied. However, in certain cases, where statutory requirements necessitate competitive bidding for such contracts, safeguards are created which take away from the board members or officials discretion as to selection and make the making of the contract mandatory when statutory requirements as to sufficient security have been met. In such cases Section 12912, supra, and similar statutes are held not to apply as it was never intended that such cases should come within these statutes.

There can be no doubt that the rule which has developed from the Richardson case, supra, clearly applies to the matter before us in the case of a contract for inactive funds.

In the case of a contract for active funds there is, I believe, violation of Section 12912, supra, where a village treasurer serves as assistant cashier of a bank which becomes a depository for village funds. In the making of such contracts under the new depository act there is no competitive bidding required.

The intent of the legislature in passing Sections 12910 and 12912, supra, and other such statutes was to discourage the possibility of favoritism and fraudulent combinations and practices which might so easily develop undetected were officers charged with the duty of safeguarding interests permitted to make contracts which would advance their personal interests and permit financial benefits. Such offenses were made punitive and the statutes forbidding them placed with the criminal sections of the General Code.

The courts have been as liberal as possible in construing such statutes. However, to go beyond the rule creating an exception in the case of competitive bidding and to allow public contracts to be made with corporations or firms whose officials and employees are public officials and to base such action upon the merits of each individual instance is to give rise to myriad exceptions which will in time deprive the law of any effect. It may reasonably be argued that the official in question has no influence or discretion in the making of such contracts. Granted that such is the case, yet the one basis upon which the courts have been willing to create an exception has been in the instance where competitive bidding is required. That instance is not present in the circumstances before us. Moreover, the last prohibitive clause of Section 12912, supra, cannot well be ignored. The statute provides:

“Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township becomes the employe of the contractor of such

contract, job, work or services while in office, shall be fined
”

The obvious and apparent meaning of the words so particularly and expressly selected is that any officer who *becomes* an employee of a contractor for a contract . . . *while in office* . . . shall be fined. The moment such a contract is made with the bank this treasurer becomes an employee of a contractor for services, etc.

In view of these facts, I am constrained to say that a violation of Section 12912, of the General Code is effected where a village treasurer serves as assistant cashier of a bank which becomes a public depository for active funds of the village.

It is therefore my opinion that:—

1. No violation of Section 12912, General Code is effected where a village treasurer serves as assistant cashier of a bank which becomes a depository for inactive funds of the village as the requirements for such contracts under Section 2296-1 et seq., General Code, include competitive bidding.

2. Where a village treasurer serves as assistant cashier of a bank which becomes a depository for active funds of the village, a violation of Section 12912, General Code, is effected.

Yours truly,

HERBERT S. DUFFY,

Attorney General.

1650.

BOARD OF TOWNSHIP TRUSTEES MAY NOT REIMBURSE
 FORMER MEMBER FROM CURRENT YEAR'S APPROPRIATION.

SYLLABUS:

A board of township trustees has no authority to reimburse from current year's appropriation a person who served as justice of the peace during the years 1932 to 1935, both inclusive, on account of such person having personally paid the premiums on his official bond during such years.

COLUMBUS, OHIO, December 17, 1937.

HON. THEODORE TILDEN, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR: Your letter of recent date is as follows: