

OFFICERS:
SCHOOLS:
BOARDS:
CITIES, TOWNS,
AND VILLAGES:
CONFLICT OF INTEREST:
PUBLIC OFFICERS:

A school board director is prohibited from participating in any contract or transaction in which he has a direct or indirect interest including the ownership of stock in a corporation doing business with the school board.

A school board of directors may deposit funds of the school district in a bank in which the president of the school board has such a small amount of stock that such ownership will not influence his judgment in behalf of the public interest and in which he is neither an officer or a director and where there is no bad faith or fraud.

August 5, 1965

OPINION NO. 193



Honorable Paul D. Hess, Jr.
Prosecuting Attorney of Macon County
Macon, Missouri.

Dear Mr. Hess:

Your letter of April 6, 1965, propounds the following question:

"A bank representative has solicited business from a six-director city school board of directors, of which the school board president is a minority shareholder (but neither a director nor officer) of said bank. Assuming lawful selection otherwise of said bank as a depository of some of such school district's funds, does the board president's interest in the bank prevent, as a matter contrary to public policy, the school district's having any contractual arrangements with said bank, or, may his said interest herein be regarded as indirect and also so remote as to permit such contractual arrangements?"

*A copy of opinion
26-1966 should
be sent with this
opinion.*

It is apparent that there is a close question involved. The right of a school board to contract or do business with a firm in which a member has an interest is subject to close scrutiny.

The cases in Missouri which hold that a public officer may not profit from his official status are based on the theory that such transactions are against public policy. See *Witmer v. Nichols*, 8 S.W. 2d 63; *Smith v. Hendricks*, 136 S.W. 2d 449, and *Nodaway County v. Kidder*, 129 S.W. 2d 857.

In *State ex rel. Smith v. Bowman*, 184 Mo.App. 549, 170 S.W. 700, 702, in discussing "public policy" the Court said that, " * * * the policy of the law is to favor fair and honest dealings * * *."

The case of *Brawner v. Brawner*, Mo. 327 S.W. 2d 808, 812, states that:

"While a precise definition of the term public policy presents difficulty, it is generally said to be that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good; it is synonymous with the 'policy of the law' and 'the public good.' *Dille v. St. Luke's Hospital*, 355 Mo. 436, 196 S.W. 2d 615, 620 (2). The definition and effect of the term is also extensively considered and discussed in *In re Rahn's Estate*, 316 Mo. 492, 291 S.W. 120, 122 51 A.L.R. 877, certiorari denied 274 U.S. 745, 47 S.Ct. 591, 71 L.Ed. 1325."

Broadly, the determinative factor seems to be, is the private interest of the officer sufficient to influence his official judgment?

The case of *Githens v. Butler County*, 165 S.W. 2d 650, 652, presents an excellent discussion on this subject as follows:

"* * * The directors of a private corporation may, if there is no fraud in fact or unfairness in the transaction, contract on behalf of the corporation with one of their number. A stricter rule is laid down in regard to public corporations, and it is held that a member of an official board or legislative body is precluded from entering into a contract with that body.' 6 Williston, Contracts, § 1735, p.4895. The basis of this common law rule is that it is against public policy (State ex rel. Smith v. Bowman, 184 Mo.App. 549, 170 S.W. 700) for a public official to contract with himself. 'At common law and generally under statutory enactment, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of a board of [or] council. * * * The fact that the interest of the offending officer in the invalid contract is indirect and is very small, is immaterial. * * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature.' 2 Dillon, Municipal Corporations, §773; 46 C.J., §308; 22 R.C.L., § 121; State ex rel. Streif v. White, Mo. App., 282 S.W. 147; Witmer v. Nichols, 320 Mo. 665, 8 S.W. 2d 63; Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857."

The law as expounded by the Supreme Court of Missouri has almost without exception frowned upon any business connection between a public official and the public interests he represents.

In *Witmer v. Nichols*, 8 S.W. 2d 63, 65, the Court said:

"* * * But on either theory of fact the transactions, in so far as the school district was involved, contravened public policy. Nichols as a member of the board of directors owed the school district an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

In *Smith v. Hendricks*, Mo.App. 136 S.W. 2d 449, a member of the school board was paid for driving a school bus. Recovery was denied in such case because suit was instituted by private persons but the court held that the State, for and on behalf of the school district could recover the amount paid a school board member for such services.

A school district is a public corporation and a member of the school board of such school district occupies a fiduciary relationship to the district he represents, *State ex rel. Brickey v. Nolte*, 350 Mo. 842, 169 S.W. 2d 50, 55.

In *State ex rel. Smith v. Bowman*, 184 Mo.App. 549, 170 S.W. 700, the Court said:

"* * * 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law

in this respect is to remove from public officials, so far as possible, all temptation to use that official power directly or indirectly, to increase the emoluments of such offices; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

It is clear from the cases that "any direct or indirect interest in the subject matter" of the contract is sufficient to taint the transaction with illegality. Certainly the ownership of stock in a corporation is a direct interest in that corporation.

As said in *Githens v. Butler County*, cited above, it is impossible to lay down a general rule defining the interest of a public officer that would be sufficient to taint the transaction. Each case must be considered alone. But all such transactions must be closely scrutinized.

The courts will and should closely scrutinize all such transactions between school board members and corporations of which they are stockholders. There may be other facts not known to this office and not considered in this opinion which might influence the courts in consideration of this problem. For example, the terms offered by the bank or the financial condition or resources of the bank in comparison to the same factors offered by other institutions could be evidence that could affect the courts' examination and conclusion respecting this problem.

We have been informed that the school board president in the case presented here is the owner of 1.25% of the outstanding shares of stock in the bank in question. He is not an officer or director of the bank.

The problem here presented then is even though the school director's ownership of stock in the bank is a "direct" interest, yet should some "de minimus" rule apply to the transaction.

This rule, which stems from the legal maxim "de minimus non curat lex," literally means that the law does not concern itself with trifles.

For example, if the transaction involved the purchase by the school board of an automobile (General Motors make) and the school director owned one share of General Motors stock which have many millions of shares outstanding then it is not likely that the school director's judgment would be influenced by his ownership of one share of stock. But how many shares or what percentage of shares would be sufficient to influence his judgment respecting his public duties and his public trust? We are unable to find any cases which offer any guidance on this difficult problem. In one approach, it is a matter of conscience, of absolute integrity toward one's public trust. This office finds it impossible to lay down any positive rule to apply that would govern this borderline case.

If the school board president's interest in the bank is so small that it could not sway his judgment or indicate fraud, then that interest might be held to be so slight as to be almost non-existent and the de minimus rule would govern the situation.

CONCLUSION

It is the opinion of this office that:

1. A school board director is prohibited from participating in any contract or transaction in which he has a direct or indirect interest including the ownership of stock in a corporation doing business with the school board.

2. A school board of directors may deposit funds of the school district in a bank in which the president of the school board has such a small amount of stock that such ownership will not influence his judgment in behalf of the public interest and in which he is neither an officer or a director and where there is no bad faith or fraud.

This opinion which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,



NORMAN H. ANDERSON
Attorney General