

CONFLICT OF INTEREST:
MAYORS:
CITIES - THIRD CLASS:
DEPOSITARIES:

The Mayor of Third Class City who is President, Director and Stockholder of bank in which city funds are deposited violates Sec. 77.470 RSMo 1959. Section 105.490 RSMo Cum. Supp. 1965 is violated by said conflict of interest.

A mayor of a third class city has no lawful authority to appoint a member of the board of trustees of a special road district formed under Sections 233.010 to 233.165 RSMo 1959, and an attempted appointment of such an officer is void.

A mayor of a third class city who attempts to name himself to the office of member of the board of trustees of the city-owned hospital, is guilty of a violation of public policy and such attempted appointment is void.

March 3, 1966

See 1978 Amendments to Ch. 105.

OPINION No. 19 (1966)
259 (1965)

Honorable Robert P. Warden
Representative Second District
415 North Moffet
Joplin, Missouri



Dear Mr. Warden:

This is in answer to your request for an opinion on two questions concerning a mayor of a third class city. Your first question reads as follows:

"Is a mayor of a city of the third class in violation of Section 77.470 RSMo 1959, whenever the funds and revenues of the city and its institutions are deposited in a bank of which said mayor is a stockholder, officer and director?"

Subsequently you advised us by letter that the Mayor was President of the bank where the city funds were deposited and his son was vice president.

This question presents a so-called "conflict of interest" problem. The common law of this state without reference to any statutes has been declared by the courts.

The Supreme Court of Missouri in *Nodaway County v. Kidder*, 129 SW 2d 857, 861, has declared that a contract between an individual and a public body of which he is a member is void as against public policy:

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"[11, 12] Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. * * *"

The Supreme Court in a more comprehensive discussion of the common law on this subject in *Githens v. Butler County*, 165 SW 2d 650, 652 said:

"[1-3] ' * * * 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;

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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."

See also Polk Township, Sullivan County v. Spencer, 259 SW 2d 804, 805, and 67 C. J. S., Officers, Section 116, Page 406 and 407.

The Supreme Court used the following language in the case of Witmer v. Nichols, 8 SW 2d 63,65:

"* * *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."

It therefore appears that it is settled law in Missouri that an individual may not deal with the city with respect to a contract where that person as an officer of the city is directly involved in a conflict of interest. With respect to third class cities the Legislature has enacted a specific statute relating to the subject. Section 77.470, RSMo 1959, which reads as follows:

"Officer prohibited from being interested in contracts, etc., how punished. -- If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; and upon the city council, or any member thereof, becoming satisfied that any officer of the city is so interested, the council shall, as soon as practicable, be convened to hear and determine the same, and if, upon investigation, such officer be found so interested, by a majority of all the members elected to the council, he shall be immediately dismissed from office."

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This section of the statute was specifically considered by the St. Louis Court of Appeals in State ex rel Streif v. White, 282 SW 147 where the Court said:

"[3] The charter of the City of Mexico (section 8237, Revised Statutes 1919), provides that, 'if any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor,' and Section 3665 Revised Statutes 1919 contains the same provision. There ought to be no question that the contract involved here is within the purview of these sections of the statute. Though the contract relates to a gift to the city in trust for the specific purpose of erecting a drinking fountain, nevertheless the contract was a contract under the city, and the work of erecting the fountain was work done by the city, within the meaning of these sections. This being so, the contract was illegal and void. As mayor of the city Gallaher had the superintending control of all the officers and affairs of the city, and it was his duty to see that the ordinances of the city and the state laws relating to the city were complied with. It was his duty to preside over the council and cast the deciding vote in case of a tie. He also had the power to veto any ordinance, resolution, or order of the council. As mayor he approved the ordinance providing for the erection of the fountain, had the plans drawn therefor, appointed a committee to get bids on the work, approved the award of the work to the relator, and signed the written contract therefor on behalf of the city. His direct interest in the contract as a partner of relator was found by the chancellor, to whose finding we ought and do defer. The contract was malum prohibitum if not malum in se. Equity will not assist a party to reap the rewards of a contract prohibited by the statute. It will not compel an officer to become a party to an illegal transaction against his will.
* * *

The problem then appears to be whether or not the mayor who is also President of a bank in which the city's funds are deposited is "directly or indirectly interested in any contract of the city." This then involves an examination of the statutes relating to depositary contracts or arrangements.

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The 1965 Session of the Legislature amended several sections of the statutes relating to the financial administration of third class cities. These were Sections 95.280, 95.285, 95.290 and 95.300, RSMo Cumulative Supplement 1965. At the outset it must be kept in mind that the city may have two types of bank deposits. First a demand deposit and second - a time deposit. The provisions of Sections 95.280, 95.285, 95.290 and 95.300, RSMo Cum. Supp. 1965, can apply only to time deposits because it will be noted that Section 95.280 commences with the language, "Subject to the provisions of section 110.030 RSMo * * *".

Section 110.030, RSMo 1959, provides as follows.

"Advertisement for bids unnecessary, when -
The various statutory provisions in relation to the advertisement for and receipt of bids and the award of the funds to the best bidder or bidders for the whole or any part of any of the public funds of the character referred to in section 110.010 shall be applicable only if and when at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, in which event such applicable statutory provisions shall be complied with; but if, at the time of the advertisement for bids or the receipt of bids or the award of funds, it shall be unlawful for depository banks and trust companies to pay interest upon such demand deposits, the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

It is, however, well known that regulations of the Federal Reserve System prevents any bank from paying interest upon demand deposits. We are not advised in the facts given us in this inquiry as to whether the deposits were demand deposits or time deposits or both. We were also not advised as to the exact procedure that the city has in the past adopted for selecting the depository of the city's funds, whether by ordinance or resolution and whether by contract or selection or by order.

The principle object apparently of the Legislature in revising Sections 95.280 to 95.300, supra, was to authorize a bank depository

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to post securities in place of a surety bond, and otherwise improve the language of the sections. Section 95.285 relating to the opening of the sealed proposals submitted by depositaries uses the language:

"* * *the city council shall select as the depositary of the funds of the city * * *"

And again in Section 95.290, supra, relating to the deposit of securities by the depositary selected by the council uses the language "the council, by order entered upon the journal shall designate the banking institution as the depositary of the funds of the city * * *". At other points in this same section is reference to the "selection" of the depositary by the city council. In Section 95.300, supra, relating to the failure of the council to select a depositary it refers to the fact that the city council at a subsequent meeting may make a new "selection" of a depositary in the same manner as provided in other sections and further provides:

"* * * If the city council at any time deems it necessary for the protection of the city, it may require, by resolution, that the depositary deposit additional security. If the depositary fails to do so within five days after the service of a copy of the resolution on the depositary, the city council may select another depositary in the manner provided."

It is therefore noticed that these facts relating to the selection of a depositary and the depositing of securities by the depositary is done by "the council" and by "order" and by "resolution". These statutes seem to contemplate, therefore, that the selection of the depositary and other compliance with these statutes shall be done by order or by resolution of the council and not by ordinance. Generally action by the council upon a resolution or an order does not require any act by the mayor.

This situation then requires an examination of the statutes relating to duties and powers of the mayor and the city council of third class cities. This subject is dealt with in Chapter 77 of the Revised Statutes. Section 77.250, RSMo 1959, provides that the mayor shall be the president of the council and shall preside over the same but shall not vote except in case of a tie in said council, when he shall cast the deciding vote, but that he shall have no power to vote in cases where he is an interested party.

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This section further provides:

"* * *He shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and the state laws relating to such city are complied with."

Section 77.260, RSMo 1959, provides:

"The mayor and council of each city governed by this chapter shall have the care, management and control of the city and its finances and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 77.270, RSMo 1959, provides:

"Every bill presented to the mayor and returned to the Council with the approval of the mayor shall become an ordinance and every bill presented aforesaid, but returned with his objection thereto shall stand reconsidered. * * *"

This section further provides:

"* * *The mayor shall have power to sign or veto any ordinance passed by the city council, and shall also possess the power to approve all or any portion of the general appropriation bill, or to veto any item or all of the same; * * *"

Section 77.280, RSMo 1959, provides the mayor shall also have the power to veto any resolution or order of the council which calls for or contemplates the expenditure of the revenues of the city. Such veto "shall be effective and binding unless the council, at a subsequent session thereof, general or special, shall pass said resolution or order by a vote of three-fourths of all the members elected to the council."

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Section 77.290 RSMo 1959, provides:

"The mayor shall from time to time communicate to the council such measures as may, in his opinion, tend to the improvement of the finances, the police, health, security, ornament, comfort and general prosperity of the city."

Section 77.310 RSMo 1959, provides:

"The mayor shall have power to require, as often as he may deem it necessary, any officer of the city to exhibit his accounts or other papers or records, and to make reports to the council, in writing, touching any subject or matter pertaining to his office."

Section 77.320 RSMo 1959, provides that the mayor shall sign the commissions and appointments of all city officers elected or appointed in the city and provides:

"* * *He shall sign all orders and drafts drawn on the treasury for money, and cause the city clerk to attest the same, and to affix thereto the seal of the city, and to keep an accurate record thereof in a book to be provided for that purpose."

We should also note the provisions of Section 77.400 RSMo 1959, which defines the term officer as follows:

"Term 'officer' construed. - The term 'officer', whenever used in this chapter, shall include any person holding any situation under the city government or any of its departments, with an annual salary, or for a definite term of office."

It is therefore to be noted that while the mayor of a third class city generally speaking has no vote in the city council except in the case of a tie, (and not then when he is an interested party) either on ordinances or resolutions, nevertheless the mayor has wide superintending control and power over the city, its officers, its affairs and particularly its finances. This leads us, therefore, to the conclusion that even though the mayor would not normally vote on the selection of a depositary, whether the matter is submitted

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to the council in the form of an ordinance to approve a contract with the depository or whether it is submitted to the council in the form of a resolution merely selecting a depository we believe that the mayor as chief executive officer having such extensive power and authority over the affairs of the city is a city officer within the meaning of Section 77.040 and being the chief executive officer of the depository is directly interested in a contract under the city.

We turn now to a consideration of the effect, if any, of the recently enacted Conflict of Interest Law, House Bill 422, 73rd General Assembly, Sections 105.450 to 105.495, RSMo Cumulative Supplement 1965.

This statute while inartificially drawn and presenting as it does problems of construction, we believe the legislative intent can be found and so interpreted.

Section 105.490 RSMo Cumulative Supplement 1965, provides:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an officer, agent or member, or the owner of a substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves."

Section 105.450 RSMo Cumulative Supplement 1965, defines Agency as follows:

"'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches of the state or any political subdivision thereof including counties cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"
(As printed in the 1965 Official Cumulative Supplement)

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We meet at once with the problem as to what is included and what is excluded in the Act's definition of "Agency". The exception clause above referred to read literally excepts the legislative and judicial branches of the State and all the political subdivisions therein mentioned including counties, cities and others. We note, however, that House Bill 422, as Truly Agreed to and Finally Passed, has a comma immediately after the words "judicial branches". If this definition is read literally, agency would be applicable only to the executive department and boards and commissions of the State of Missouri. If this language were construed with the comma following the word "branches" as the bill was passed we meet some other difficult problems. This would then provide an exception and make the law not applicable to the judicial and legislative branches of political subdivisions. This would produce most difficult and artificial interpretations of what is executive and what is legislative in cities, school districts, road districts and other specified districts. This would cause interpretation that would or might be artificial and unrealistic. It might also largely nullify what we believe was the legislative intent and purpose to stop the conflict of interest evil. We are convinced that the legislative intent was that the exception clause was intended to apply only to the Legislative and Judicial Branches of the state. The punctuation should have been therefore that a comma should be after the word "State". We therefore believe that the Legislative intent was that the word agency was intended to be applicable to any political subdivision of the state, including counties, cities, towns and villages, school, road, drainage, sewer, levee and other special purpose districts.

Turning now to the first clause of Section 105.490 which provides as follows:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member or in which he owns a substantial interest; * * *"

It is perfectly clear that an officer of an agency includes the mayor of a third class city. Thus, this provision prohibits the mayor from transacting any business with any business entity of which he is an officer. Clearly as president of a bank the mayor of the city is transacting business with the bank when the city deposits the city funds in that bank. We have heretofore discussed in this opinion the powerful executive control which the mayor of a third class city has and exercises over the operation and affairs

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including financial affairs of the city. What then is the meaning of the phrase "In his official capacity"? Undoubtedly the legislative intent was to distinguish between an officer of the city in his personal and private business and his business affairs on behalf of the city or other agency of which he is an officer. It is therefore our view that the mayor of a third class city in his supervisory control and authority over the affairs of the city and the possibility that he might or could vote on either an ordinance or resolution of the city council selecting a depository, or sign a contract or agreement between the city and the depository, or possibly fail to act where the city funds are in jeopardy within his knowledge by reason of some act or conduct either by other officers or employees of the bank or other officers of the city would constitute a conflict of interest in violation of Section 105.490, RSMo Cumulative Supplement 1965.

Your next question reads as follows:

"Does a mayor of a city of the third class forfeit his office under Article 7, Section 6, Missouri Constitution, when he has named or appointed himself with the approval of the city council to be a trustee or board member of a special road district of said city, or a trustee of a city owned hospital?"

You state that the mayor appointed himself to the board of trustees of a special road district and such action was approved by the city council. We are unable to find any authority for a mayor to appoint members of the board of trustees of a special road district.

Section 233.040 RSMo 1959, applicable to road districts established under provisions of Sections 233.010 to 233.165, RSMo 1959, generally referred to as eight mile districts, provides that the members of the board of trustees of such districts shall be appointed by a board composed of the county judges of the county in which the district is located and the mayor and council members of any city or town in such district.

However, this alleged appointment was apparently not made under such section and we therefore regard the alleged appointment by the mayor with the approval of the city council as being void, because it was without any lawful authorization.

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Article VII, Section 6, of the Missouri Constitution prohibits appointment or employment by public officials of their relatives. Such section has no applicability to self-appointment and does not apply to the question you ask.

Therefore, the attempted appointment by the mayor of himself as a member of the board of trustees of the city-owned hospital is not a violation of the constitutional nepotism provision.

However, the attempted appointment by an officer of himself to public office is against public policy and void.

In State v. McDaniel, 52 Del. 304, 157 A. 2d 463, at 466, the Court stated:

"* * *The general law has been laid down * * * that it is contrary to public policy to permit a board to exercise its power of appointment by designating someone from its own body * * * Such purpose cannot be attained when the appointee, as a member of the appointing body has the opportunity for a closer association and influence upon the members much greater than would be the case where the persons considered for appointment were not members of the appointing body."

The Court went further and at page 467, held such violation of public policy as "void".

In Commonwealth v. Major, 343 Pa. 355, 22 A. 2d 686, the Court stated at p. 689:

"* * * that there is 'a virtual unanimity of opinion,' among all responsible men that it is against public policy for a public official to appoint himself to another public office within his gift, is beyond all question. Courts not only of this Commonwealth, but of every other jurisdiction known to us, have uniformly held that personal interest of a public officer creates disqualification * * *. Furthermore, even if respondent had not voted for his own appointment for the other members of council of which he was a member to have placed him on the Board * * * would, nevertheless, still have been definitely against public policy."

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In Wood v. Town of Whitehall, 120 Misc. 124, 197 N.Y.S. 789, at page 790, where the appointee did not participate in voting, the Court states:

"It seems clear to me it would be contrary to public policy and the general welfare to uphold such appointment * * *an appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his own vote was necessary to the appointment."

In State ex rel Smith v. Bowman, 184 Mo. App. 549, 170 SW 700, the Court, citing numerous authorities held that such appointment by an appointing authority of one of its members is against public policy, stating at page 701:

"The defendant contends, and in this we agree as did the learned trial judge, that granting that the power and duty to select a city clerk is vested in the city council, then such council could not select and appoint one of its own number to that office. This is true because such exercise of the appointive power is against public policy * * *"

And at page 702, of this same case, it is stated:

"These and numerous other decisions show that in determining what is or is not against public policy, we may and should go to the common law and to the decisions of other states as well as our own, the same as in determining any other rule of substantive law. We are also to consult the Constitution and statutes of our state on kindred and cognate subjects.

Tested in this manner, we have no hesitancy in holding that it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office * * *"

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CONCLUSION

It is the opinion of this office that the Mayor of a third class city who is president, director and stockholder of the bank in which the city's funds are deposited violates Section 77.470 RSMo 1959.

Section 105.490, RSMo Cumulative Supplement 1965, is violated by said conflict of interest.

A mayor of a third class city has no lawful authority to appoint a member of the board of trustees of a special road district formed under Sections 233.010 to 233.165 RSMo 1959, and an attempted appointment of such an officer is void.

A mayor of a third class city who attempts to name himself to the office of member of the board of trustees of the city-owned hospital, is guilty of a violation of public policy and such attempted appointment is void.

The foregoing opinion which I hereby approve was prepared by my assistant, J. Gordon Siddens.

Yours very truly,



NORMAN H. ANDERSON
Attorney General