

CONFLICT OF INTEREST:
CITY COUNCILMAN:
INSURANCE:

A member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo. Cum. Supp. 1967, and Section 106.300, RSMo. 1959, if he furnishes insurance to the

city. A city councilman would also violate Section 105.490 and Section 106.300 if he was a member of the Ray County Insurance Agents Association and, as such, participated in the division of the agent's commission made among the members of said association.

See 1978 amendments to Ch. 105

OPINION NO. 246

September 12, 1968

Honorable Charles H. Sloan
Prosecuting Attorney
Richmond, Missouri



Dear Mr. Sloan:

This is in reply to your request of March 28, 1968, reading as follows:

"Please have your office render an official opinion as to an alleged violation of Missouri's conflict of interest laws. The question concerns a member of the city council of Richmond, Missouri, which is a third class city. The city has previously placed their fire and casualty insurance through the Ray County Insurance Agents Association, using the names of only two agents but apportioning part of the premium to all of the members of the said association. In October, 1967, the policies were to be renewed and the city council awarded the insurance contracts to an individual who is also a member of the city council. He is not a member of the Ray County Insurance Agents Association; however, he apparently had made application for membership and was refused. Said councilman was present at the meeting that they awarded the said insurance contracts but did not vote.

Also, please have your office render a further opinion as to whether a member of this association who is a councilman and participates in the premium division is in violation of the conflict of interest laws. The insurance was not placed with that said agent as an individual."

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The conflict of interest statute which is involved here is Section 105.490, RSMo. Cum. Supp. 1967:

"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 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 office, agent or member, or the owner of 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.

2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

A previous opinion of this office, Op. Atty. Gen. No. 312, Gum, 12-21-67, a copy of which is enclosed, held that a city councilman of a fourth class city, who was also an insurance agent, would violate Missouri's Conflict of Interest Law by furnishing insurance to the city whether or not he was the low bidder. The rationale of the opinion, based upon Section 105.490, was that a city councilman was prohibited from transacting any private business with the city which he served as councilman. The city council of a third class city is entrusted with the management and welfare of the city's interest. Section 77.260, RSMo. 1959. The purpose of Section 105.490 is to remove even the possibility of personal influence in official decisions of governmental agencies.

The first question that you pose deals with the situation where a city councilman was awarded the city's insurance contracts as an individual agent. The councilman was present at the meeting which awarded the insurance contracts to him but he did not vote on the issue. However, we do not feel that this factor enables the councilman to elude the reach of the Conflict of Interest Law.

In cases concerning nepotism in Missouri, the courts have found that it is important to determine whether or not a public official accused of nepotism actually participated in, or voted on, the authorization which resulted in the hiring of a relative.

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The constitutional amendment prohibiting nepotism was interpreted in McKittrick v. Whittle, 63 S. W. 2d 100. It was said in that case:

"* * * The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power) either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. * * *"

We are not concerned here with nepotism but, rather, a conflict of interest problem. If the purpose of Section 105.490 is to be served, it cannot be thwarted by merely having an interested official fail to vote on the business transaction in question. The Missouri Supreme Court has said that municipal officers may not enter into contracts with the municipality that they represent. In Githens v. Butler County, 165 S. W. 2d 650, 652, the Court said:

"* * * 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."

This rule is now supplemented by Section 105.490, RSMo. Cum. Supp. 1967. It is unlawful for a public official to transact private business with the agency that he represents. There is no requirement that he participate in the meeting which authorizes the business or that he cast his vote for the proposition. A councilman who furnishes insurance to the city that he represents is transacting business with the city. He is doing so both as an insurance agent and as a councilman. He is acting as a private businessman and a public official at the same time. Under the statute with which we are dealing, he cannot simultaneously wear two hats. We feel that this comes within the ambit of Section 105.490 as it was interpreted in the former opinion of this office which we have attached hereto.

Honorable Charles H. Sloan -

There is a continuing relationship between the city council and the insurance company during the life of the insurance contract. The city council has a duty to take action in regard to the insurance contract when circumstances arise which call for such action. The councilman who furnished insurance to the city shares the continuing duty of the council to periodically review the insurance coverage and to take necessary actions in regard to it. Therefore, whether or not he voted on the matter in the first instance, the councilman's continuing duty or act when circumstances call for such action (whether or not such circumstances actually ever arise) is the transaction of business within the meaning of the statute.

Section 106.300, RSMo. 1959, should also be considered in resolving your question. That section in part reads as follows:

"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; . . ."

We believe that this statute would apply when a member of the city council receives an insurance contract from the city himself or if he shares in payment of the insurance contract which is awarded to another person. Again, we note that this statute does not hinge upon whether or not the interested councilman votes for the insurance coverage. The vice lies in his interest, not in how he votes on the issue.

The matter of voting by city councilmen has been discussed in a previous opinion of this office, Op. Atty. Gen., No. 249, 8-6-65, a copy of which is enclosed. The opinion holds that it is the general rule that where someone who is present but refuses to vote on a proposition or remains silent is regarded as having voted affirmatively or with the majority of those who voted. In our situation, this would mean that even if the councilman abstains from an active vote he is legally counted with the majority who voted to obtain the insurance.

The second question that you pose presents the problem somewhat differently. As we understand the arrangement, the city council would select insurance coverage from one or two local agents who were not members of the city council. The part of the insurance premium applicable to the agent's commission is then divided among the members of the Ray County Insurance Agents Association. Our question arises when a member of that Association, sharing in the division of the agent's commission, is also a member of the city council which purchased the insurance for the city.

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The purpose of Section 105.190, as expressed in this opinion and in the former opinion of this office upon which we rely, leads us to conclude that this arrangement is also precluded by the statute. We feel that it also violates Section 106.300, RSMo. 1959. The Ray County Insurance Agents Association does not include as members all of the insurance agents in the area. A councilman who was a member of that association would gain if insurance was placed with an agent who was also a member of the association rather than with an agent who was not a member of the association. The scheme would allow a councilman to profit merely because he was an insurance agent and a member of the Agent's Association even though he offered no service to the city. Conflict of interest laws should not be construed to allow something to be done indirectly that can not be done directly.

CONCLUSION

A member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo. Cum. Supp. 1967, and Section 106.300, RSMo. 1959, if he furnishes insurance to the city.

A city councilman would also violate Section 105.490 and Section 106.300 if he was a member of the Ray County Insurance Agents Association and, as such, participated in the division of the agent's commission made among the members of said association.

The foregoing opinion, which I hereby approve, was prepared by my assistant Gary G. Sprick.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

Enc. Op. No. 312, Gum, 12-21-67
Op. No. 249, Schechter, 8-6-65 } *Withdrawn*