SCHOOLS: If chairman of board of education employed by
SCHOOL DISTRICTS: transportation company which furnishes school
OFFICERS: transportation to his district has direct or
CONTRACTS: indirect pecuniary interest in transportation contract, such contract is void as against public policy.

FILED
28

January 9, 1957

Honorable James W. Farley
Member, House of Representatives
Platte County
Farley, Missouri

Dear Mr. Farley:

This is in response to your request for opinion dated November 28, 1956, which reads, in part, as follows:

> "I have had a request for a ruling from your office concerning a situation that has arisen in one of our Platte County School Districts. The facts are as follows:
>
> The School District in question contracts with a transportation company for said company to furnish bus transportation to the pupils of a district. One of the bus drivers employed by the transportation company is also president of the School Board. Section 165.360 of the Statutes prohibits any member of such a School Board from holding any office or employment of profit from said Board while a member. The point that we wish to have ruled upon is whether the president of the School Board is violating the Statute by accepting employment from the transportation company. The checks used to pay the bus drivers come directly from the company and the School Board only contracts with the company. I might also add that the largest town in the School District in question is a city of approximately 1100 persons.
>
> "One other point that has also arisen in the same district is whether or not a School Board member who runs an oil business can

> contract with or sell oil to the School District without violating the above Statute."

We are enclosing herewith copies of the following opinions which provide the answer to your second question and furnish the principle upon which the first is based:

> Honorable Fred C. Bollow, June 30, 1948;
> Honorable Homer L. Swenson, July 17, 1950;
> Honorable James T. Riley, May 15, 1953.

These opinions hold that it is against the public policy of the state for a member of a board of education in his private capacity to contract with the board of which he is a member. This is a flat prohibition. However, with regard to the situation first presented in your request, where the board member is not the contracting party but merely a driver for the contracting transportation company, it becomes a question of whether the board member has a direct or indirect interest in the contract, i.e., whether he stands to benefit from it personally.

It has been said by courts in other jurisdictions that no definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. For example, in Tuscan v. Smith, 130 Me. 36, 153 A. 289, 73 A.L.R. 1344, 1352, the town board had entered into a lease agreement with the brother of the chairman of the board. The chairman's brother was heavily indebted to him and the chairman had taken an active part in the entire business transaction. The court conceded that mere indebtedness did not necessarily create such an interest as would make the contract illegal but in this case the indebtedness, together with the activity of the chairman in the matter, his confidence and business relations with his brother and the other circumstances which discouraged bidding, indicated such an interest in the chairman as to void the contract. The court said, A. l.c. 294:

> "It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity. No definite rule

> can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321, 93 A. 838, 840, the question really is whether the town officer by reason of his interest is placed 'in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official.' See as authority for the same general principle, the following: Bay v. Davidson, 133 Iowa, 688, 111 N.W. 25, 9 L.R.A. (N.S.) 1014, 119 Am. St. Rep. 650; Dillon: Municipal Corporations (5 Ed.) § 772, 773; Lesieur v. Inhabitants of Rumford, supra."

In Commonwealth ex rel. Gardner v. Elliott, 291 Penn. 98, 139 A. 626, a city councilman was the brother of a painting contractor who had a contract with the city. The councilman was employed by his brother to do certain work under the contract. No emphasis was laid on the fact of relationship except that it was noted that transactions between brothers would naturally be special ones without formal contract or arrangement. It was held, however, that the councilman had such an interest as would warrant his ouster from office. The court said, A. l.c. 627:

> " * * * He assumed and appropriated to himself such an interest - a pecuniary interest - in the contract by accepting and performing labor, for pay, under it, thus receiving, while a borough officer, benefits arising from a contract for work to be paid for out of the public funds. The pecuniary remuneration for labor so performed constituted the forbidden 'interest' in that contract from which, as a borough officer, he profited. This is precisely what the law prohibits and which was enacted to protect the people from the frauds of their servants and agents. The record in this case discloses no fraudulent intent on the part of respondent; his participating in the performance of the contract was, however, a violation of the law, whether done innocently or not, and the assignments of error must be overruled."

It is to be noted in this case also that the councilman was not just an employee but was making money under this particular contract.

In Gillen v. City of Milwaukee, 174 Wis. 362, 183 NW 679, the public official was a superintendent for the contracting corporation drawing a salary of $4,500 per year as such. In holding that because of the interest of the official the corporation was not a competent bidder, the court said, NW l.c. 682:

> " * * * actual loss to the public is not the principle on which the law proceeds in condemning transactions of this kind. The law seeks to avoid situations where public officers are tempted to sacrifice the interests of the public to their own, which destroy faithfulness and fidelity in public service.
>
> " * * * But we find very little authority on the exact question here involved; that is, whether contracts with a municipality made between a corporation having a salaried manager or employe who is also an officer of the city or board are valid. We do not hold that under all circumstances a contract between a municipality and a corporation having an employe who is also a public officer of the municipality would be invalid. The compensation of the employe might be so slight or his employment so transient that there would arise no conflict of interest. We do hold that under the facts proven in this case the commission and the trial court were justified in deciding that the Gillen Company was not a competent bidder."

Regardless of the type of case, i.e., whether it involves a debtor-creditor relationship, an officer or stockholder of a corporation, a member of a partnership, or an employee, the ultimate question to be determined is whether the officer by reason of his interest is placed in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized him to act in the premises as an official. For further discussion of this problem generally, see 43 Am. Jur., Public Officers, Sections 296-302, pages 105-109; 47 Am. Jur., Schools, Section 49, pages 329-331; 73 A.L.R. 1344; 74 A.L.R. 790.

Honorable James W. Farley

The question of interest is one of fact to be determined in each case. Wayman v. Cherokee, 204 Ia. 675, 215 NW 655. From the opinion request, we are unable to make this determination but merely furnish these guiding principles in order to aid those who in the first instance must make this determination.

We are inclined to agree with the Wisconsin court that employment alone would not be a sufficient interest to invalidate the contract. However, other factors should be considered and weighed, such as the nature of the employment, the relation of the board member to the governing officers of the employing company, whether the board member will make money under this particular contract, how much he is paid, whether his job depends upon the award of the contract to his employer, etc.

In short, if the facts indicate that the board member has a direct or indirect pecuniary interest in this contract, it is void as against public policy.

CONCLUSION

It is the opinion of this office that the mere employment of the chairman of the board of education of a school district by a transportation company which contracts with the district to furnish school transportation does not in and of itself invalidate the contract, but if the chairman of the board has a direct or indirect pecuniary interest in the contract, which is to be determined by considering his employment along with other factors present in each given case, the contract is void as against the public policy of the state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

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